Supreme Court, U.S.
FILED
'97 1636 APR 6 1998
OFFICE OF THE CLERK

No. 97-___

In The

Supreme Court of the United States

October Term, 1997

SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC., et al.,

Petitioners,

vs.

CABAZON BAND OF MISSION INDIANS, PETE WILSON, Governor of the State of California, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX
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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CABAZON AND SYCUAN BANDS OF MISSION INDIANS, Plaintiffs-Appellees, and **BARONA AND VIEJAS BANDS OF MISSION INDIANS,** Plaintiffs-Intervenors-Appellees, vs. **PETE WILSON,** Governor of the State of California; **STATE OF CALIFORNIA;** and **CALIFORNIA HORSE RACING BOARD,** Defendants-Appellants.	No. 96-16432
SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC., ET AL., Proposed Intervenors-Appellants.	

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INTRODUCTORY STATEMENT

Nature of the Controversy

Although this case may have originated as a dispute about jurisdiction, and no matter how the State[1] may attempt to characterize it otherwise, at this point this appeal is about nothing more than money. More precisely, this appeal is about whether the State will be able to hold on to a large fund of money that has accumulated while the State and four federally-recognized Indian tribes[2] have litigated their respective entitlements to that fund. Despite the State's desperate attempt to shift the focus, the essential nature of this case at this point is the disposition of this fund, to which this Court has already held the Tribes are entitled.

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[1] As used herein "State" refers to both the State of California and Governor Wilson.

[2] The four tribes are the Cabazon and Sycuan Bands of Mission Indians, who filed the original action in 1990 (hereinafter referred to as the "original plaintiff tribes", and the Barona and Viejas Bands of Mission Indians who intervened in mid-1996, making claims identical to those of the original plaintiff tribes. Together, the four tribes will be referred to herein as the "Tribes."

The genesis of the present controversy stems from the inability in 1990 of the original plaintiff tribes to reach agreement with the State on a crucial jurisdictional issue in the course of negotiating their respective compacts with the State regarding the conduct by those tribes of off-track wagering on horse races, also known as simulcast wagering.[3]

The Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701, et seq., (hereinafter, "IGRA") authorizes tribes and states to negotiate and enter into such compacts on the subject of how such a tribe in such a state may engage in this form of class III gaming on its federal Indian reservation. One of the purposes of this authorizing statute is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments", 25 U.S.C. § 2702(1). The compacting process is a unique arrangement devised by Congress for multiple purposes, including the raising of revenue by tribal governments:

> In the Committee's view, both State and tribal governments have significant governmental

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[3] California allows live on-site wagering on horse races both at race tracks where the race is being run, and off-track wagering at other locations which are linked to the live race by the instantaneous electronic transmission of the audio and visual race signals from the live track to these remote "satellite" locations. The arrangement is known as "simulcast" racing and wagering at remote "simulcast facilities. Wagers placed at both the live location and these simulcast facilities are placed into a single parimutuel pool, and winners are paid at all locations from this pool.

> interests in the conduct of class III gaming. States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe[s] and States. This is a strong and serious presumption that must provide the framework for negotiations. A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency, and Indian self-determination, and regulating activities of persons within its jurisdictional borders.
>
> Senate Report No. 100-446, 100th Cong., 2nd Sess., August 3, 1988, p. 13, reprinted in vol. 5 of *1988 U.S.C.C.&A.N.* 3071, 3083

Throughout the compacting process, one principle is clear: a state may not attempt to tax or otherwise profit from tribal governmental gaming under such a compact, beyond being reimbursed for its actual and reasonable costs of regulation. See 25 U.S.C. § 2710(d)(4). Even a request for such state taxation is *per se* an act of bad faith bargaining. 25 U.S.C. § 2710(d)(7)(B)(iii)(II).

When the original plaintiff tribes were negotiating with the State on the subject of tribal operation of simulcast wagering facilities on their reservations, as described above, agreement was reached on all points but one. In general, the State and the original plaintiff tribes agreed to follow the same state statutory scheme for allocating and distributing the total amount wagered (known as the "handle") as applies to all non-tribal simulcast facilities.

This statutory scheme allocates stated percentages[4] of the handle to local governments,[5] to the state as a daily license fee,[6] to the state of administrative expenses, to pensions, to purses, to commissions, to horse registration, to breeder and stallion awards, to the California standardbred sires stakes program, to equine research, to winnings for successful wagers, etc.

The State and the original plaintiff tribes agreed that the tribes would receive the same 2% of the handle allocated by this state statutory scheme to all other simulcast facilities[7] as their commission, plus the 0.33% allocated to local governments[8] for providing governmental services. SCOTWInc., one of the proposed plaintiff-intervenor-appellants, would receive 1% for transmitting the simulcast signal and performing other functions.[9] Of whatever funds remain after all the above allocations and distributions to winning bettors, the other proposed plaintiff-intervenor-appellants (the racetracks[10]) would receive

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[4] These percentages vary somewhat by breed of horse being raced and the type of wagers placed. See California Business & Professions Code (hereinafter "B&P") §§ 19605.7, et seq. for the entire complex allocation scheme.

[5] B&P § 19610.4

[6] B&P § 19605.71

[7] B&P § 19605.71

[8] B&P § 19610.4

[9] B&P § 19605.71

[10] As used herein, the "Tracks" refer to the proposed plaintiff-intervenor-appellants, including Del Mar Thoroughbred Club, Hollywood Park, Inc., Los Angeles Turf Club, Oak Tree Racing Association, Los Alamitos Race Course, and Los Angeles County Fair, but excluding Southern California

50%, and the horsemen participating in a particular race would receive the other 50%.[11]

The one point on which the State and those two tribes could not agree was whether the State's collection of its license fee on wagers placed at tribal simulcast facilities is permissible under IGRA. That fee varies from 1-4% of the handle, depending on the breed of the horse in a particular race and other factors. See B&P §§ 19611-19612.6.

Rather than allow an impasse on this issue to obstruct the compact negotiation process, the original plaintiff tribes and the State agreed in their respective compacts that the tribes could seek declaratory relief in the U.S. District Court on this question. Paragraph 19(B) of each compact provided that, if the final judgment in the anticipated litigation, after all appellate review, was that the fee was permissible under federal law, the State would retain the funds in its treasury, but that if the state license fee was determined to be impermissible in such a final judgment, the State would pay the accumulated disputed funds from its treasury to the tribes for the period up to the finality of the judgment (less the State's

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Off-Track Wagering, Inc., which will be referred to herein as "SCOTWInc." SCOTWInc. is an organization that transmits the simulcast audio and visual signals from the tracks where the races are being run to the various off-track or simulcast facilities. See B&P § 19608.2. Although it acts as agent of the tracks, it is compensated by a flat 1% rather than a percentage of the unallocated revenues. Thus, SCOTWInc. cannot have a claim to the disputed state license fee, as the Tracks assert in the form of their claim that this tax falls into this residual category.

[11] B&P § 19605.8(a)

actual regulatory costs), and thereafter the disputed funds would be distributed directly to the tribes. The actual language of paragraph 19(B)(3) of the Sycuan Band's compact[12] with the State is:

> In the event a final judgment is obtained that the deduction and distribution of the state license fee is impermissible under the [Indian Gaming Regulatory] Act, and following the exhaustion of all appellate review, **the State shall pay over to Sycuan the amount of the state license fee previously distributed to the State under this Compact,** exclusive of the assessments due and owing under subparagraph (4), below, **and Sycuan shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Sycuan simulcast wagering facility. The amount of state license fee previously distributed to the State** and not reasonably claimed by the State as due and owing from the commencement of operation of the facility, and such pre- or post-judgment interest, if any, as the Court may determine, **shall be paid over to Sycuan as soon as practicable, and in any event not later than sixty (60) days following the entry of final judgment.** [emphasis added]

The above compact language is simple and clear. Depending on the final outcome of the planned litigation, either the State would keep the disputed funds itself, or it

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[12] Identical or equivalent language appears on the compacts of each of the four appellee tribes.

would pay to the Tribes both the money that had accumulated prior to final judgment, and the money that thereafter otherwise would be deducted and distributed to the State for the duration of the compacts.

The two original plaintiff tribes won the case on appeal to this Court in October of 1994.[13] Certiorari was not sought, so this Court's decision became final in January of 1995. The Tribes have been trying to collect their money ever since.

The amount at stake is large and growing larger by the day. The accumulated state license fee for all four appellee tribes already stood at over $11,000,000 as of March 31, 1996, and the State is collecting more license fees during the pendency of these appeals. Because of the State's intransigence and delaying tactics, the Tribes have been and continue to be deprived of funds with which they would pay the operating costs for their simulcast facilities, as well as provide the governmental services and programs that IGRA directs shall be funded with tribal gaming revenues.[14]

That is why the tribes have litigated this case. Enough money is at stake here to make a significant

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[13] *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994).

[14] IGRA requires that a tribe devote its net gaming revenues only "(i) to fund tribal governmental operations or programs; (ii) to promote the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; and (v) to help fund operations of local governmental agencies. 25 U.S.C. § 2710(b)(2)(B).

difference in the level of basic services (e.g., health care, paved roads, educational scholarships, senior nutrition programs, housing assistance, day care, fire protection, etc.) that the tribal governments, which have few if any other resources, can provide to their people. Many of these Indian people have been living in some of the most abject poverty of anyone in this country for literally centuries.

The tribes make this point not to elicit sympathy, but rather to show that the State is simply wrong in its effort to characterize its responsibility under the above compact language as merely determining whether the state license fee in this context is to a forbidden tax under IGRA. That is not the nature of this appeal. On the contrary, the primary interest at stake in this case and this appeal has *always* been the funds which the State simply does not want to pay to the Tribes.

Statement of the Case

The Cabazon and Sycuan Bands of Mission Indians entered into their tribal-state compact with the State in 1991. Each compact contained the above quoted language. The Secretary of the Interior approved each, and published his approval in the *Federal Register*. The compacts were then in effect. Those tribes then in 1991 entered into the first of a series of operating agreements with SCOTWInc. and the Tracks pursuant to their compacts and B&P § 19608.2 for the transmission of the simulcast signal from the various racetracks to the tribal simulcast facilities. The Barona and Viejas Bands entered into the first of similar series of operating agreements

with SCOTWInc. and the Tracks in 1992. Thus, the four tribes have been receiving the simulcast signal and operating their facilities since 1991-1992.

Meanwhile, the Cabazon and Sycuan Bands began litigating this case, as provided in their compacts. Initially, the District Court ruled in favor of the state, holding that there was no federal preemption of the state license fee in IGRA, primarily because the legal incidence of the tax was found to fall on the Tracks, rather than on the tribes. *See Cabazon Band of Mission Indians v. California*, 788 F.Supp. 1513 (E.D. Cal., 1992). However, this Court eventually reversed in *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir., 1994)., finding that under IGRA's comprehensive preemption of the field of the regulation of gaming on Indian lands, the compacts, and not state law, control the distribution of the handle, and that under the compacts the tribes have a "right" to the disputed state license fee. In the final paragraph of its opinion, this Court remanded the case to the District Court.

> We conclude that IGRA preempts the State of California from taxing offtrack betting activities on tribal lands. Accordingly, the district court's grant of summary judgment [to the State] is reversed and remanded with instructions to enter summary judgment for the Bands.
>
> *Id.*, 37 F.3d at 435

When the State did not seek certiorari, the case was remanded to the District Court for what the Tribes anticipated would be a routine entry of judgment in their favor.[15]

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[15] Until the remand, the Barona and Viejas Bands of Mission Indians were not parties to the litigation because their

But that is not what happened. Instead, by letter dated May 31, 1995, the State informed all four appellant Tribes that this Court's decision in *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir., 1994) rendered their four compacts invalid, and that therefore the State would cause SCOTWInc. to discontinue the simulcast signal as of July 1, 1995. To prevent the loss of the simulcast signal (without which no simulcast facility can operate), the original plaintiffs, the Cabazon and Sycuan Bands, filed motions for a temporary restraining order, and the Barona and Viejas Bands of Mission Indians filed complaints in intervention and similar motions. By its Order of June 30, 1995, the District Court granted the intervention and the temporary restraining order. On July 12, 1995 the District Court issued a further order directing not the entry of judgment in favor of the Tribes as this Court had directed, but rather that the Tribes file amended complaints and complaints in intervention seeking the recovery of the disputed funds and related relief. In doing so, the District Court rejected the motion of the Tribes for further relief under 28 U.S.C. § 2202, namely, the entry of judgment in favor of the tribes for

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compacts simply provided that they and the State would be bound by and follow the outcome of the litigation initiated by the Cabazon and Sycuan Bands regarding the disposition of the state license fee. When the State threatened to cut off the simulcast signal to their simulcast facilities, they had to act, and did so by seeking and obtaining leave to file complaints in intervention patterned after the complaints of the original plaintiffs, and Cabazon and Sycuan Bands, as they joined the other tribes in seeking and obtaining a temporary restraining order to prevent the loss of the simulcast signal. See the District Court's Memorandum of Decision and Order of June 30, 1995.

the payment of the accrued and future state license fees, as directed by this Court as the subject of the remand. Instead, the District Court wished to allow the State to assert its various defenses to the Tribes' amended complaints and complaints in intervention, and to assert its counterclaims against the Tribes.

The Tribes objected to having effectively to start their litigation concerning the disposition of the accumulated state license fees over again by filing amended complaints and complaints in intervention, and instead argued that all that was needed after this Court's explicit remand order was entry of judgment by way of their motion for further relief under 28 U.S.C. § 2202. However, the District Court disagreed.

To test whether such a new phase of the litigation was proper, two of the Tribes filed a petition for a writ of mandamus with this Court, requesting that the District Court be directed to follow this Court's remand order instead of requiring the four Tribes to file amended complaints and complaints in intervention aimed at recovering the funds which were the subject of the earlier appeal to this court. By its order of December 8, 1995, this Court denied the petition for a writ of mandamus, holding that, because relief by appeal was available, use of the extraordinary writ was unnecessary.

Accordingly, the four Tribes filed their amended complaints and complaints in intervention, seeking the same disputed state license fee funds as had been the original object of this case in 1990. The State filed its answers, asserting several affirmative defenses and counterclaims. The four Tribes moved to strike the affirmative defenses

and to dismiss the counterclaims. The District Court granted these motions in full by its Memorandum of Opinion and Order of April 26, 1996, which also directed the State to "report to the Court within 14 days as to how it will comply with the compacts in light of the ruling by the Court of Appeals." In response, the State submitted no such report, but instead filed a motion for reconsideration. By its Memorandum of Decision and Order of July 19, 1996, the District Court denied the State's motion for reconsideration and directed that "Within 14 days of this order the State shall pay over to the tribes the monies that have been assessed as a license fee on parimutuel offtrack wagering at the plaintiffs' simulcast facilities. . . . The court will not stay this order."

The State now appeals from this order directing actual payment of the sums which have accumulated to the credit of the four Tribes since 1991, and which this Court has already determined the Tribes have a "right."

Summary of Argument

Because this Court has already determined the merits of this case, this appeal is unnecessary. The District Court exceeded its jurisdiction on the remand of this case by requiring the Tribes to amend their complaints and allowing the State to raise new affirmative defenses and counterclaims. Instead, the District Court should have simply entered judgment in favor of the Tribes, as this Court directed. At this point, this Court should ignore all issues raised by the State's post-remand affirmative defenses and counterclaims, and instead re-remand the case to the

District Court with specific instructions to enter judgment in favor of the Tribes without any further proceedings.

However, if the Court wishes to consider the merits of the State's new affirmative defenses and counterclaims, the Tribes assert that the District Court was correct in determining that it did have jurisdiction to enforce the terms of the compacts, under not only 28 U.S.C. § 1331 and 1362, but also IGRA and federal common law. Similarly, the State's waiver of its immunity under the Eleventh Amendment is unconditional and sufficient to support both the declaratory and the monetary relief that the Tribes demand.

The District Court did not err in refusing to consider evidence as to the intent of the parties to the compacts because the language used is clear and unambiguous, and has already been definitively construed by this Court. The District Court was equally correct in striking the State's new affirmative defenses and dismissing its counterclaims. All were attempts to circumvent or to relitigate this Court's holding in *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir., 1995) that the *only* was that a state may obtain any jurisdiction over tribal governmental gaming on a federal Indian reservation is through a tribal-state compact so providing. The present compacts pertain only to state regulation of simulcast wagering within the simulcast enclosures, and therefore cannot be used to expand state jurisdiction beyond what is expressly provided for in those compacts.

The State's new counterclaims are also barred by Tribal sovereign immunity since they go far beyond the

narrow issue that the Tribes tendered to the Court in this litigation in addition to being an attempt to secure the jurisdiction that this Court denied to the State in *Sycuan, supra,* in the absence of a compact governing tribal gaming activities outside the simulcast enclosures.

I.

THE DISTRICT COURT ACTED IN EXCESS OF ITS JURISDICTION OR ABUSED ITS DISCRETION BY REQUIRING THE TRIBES TO FILE AMENDED COMPLAINTS AND COMPLAINTS IN ITVERVENTION [sic].

As a threshold matter, the Tribes must first point out what they believe was a wrong fork in the road taken by the District Court which, had it not been taken, would have avoided this appeal.

As noted above, **the underlying issue in this case** (i.e., whether the State or the Tribes is entitled to the money that would otherwise be deducted from the gross handle of wagers placed at the Tribes' simulcast facilities and distributed to the State as its license *fee*) **has already been finally adjudicated by this Court.** *Cabazon Band of Mission Indians v. Wilson,* 37 F.3d 430 (9th Cir., 1994). The essence of the Court's analysis was:

> State law does not govern this case, however. Rather, the terms of the compacts control. [cit.om.] Under the Cabazon and Sycuan Compacts, if the Bands prevail in this litigation, the State is required to pay them the amount of the state license fee that the State receives from the racing associations based on wagers at Indian facilities. If the Bands lose, however, they will

> be deprived of this amount, which will go to the State. Contrary to the conclusion of the district court, the Bands do indeed have a "right" to the unpaid fees.
>
> *Id.*, 37 F.3d at 434.

The Court's ultimate holding and disposition were equally clear:

> We conclude that IGRA preempted the State of California from taxing offtrack betting activities on tribal lands. Accordingly, the district court's grant of summary judgment is reversed and remanded with instructions to enter summary judgment for the Bands.
>
> *Id.*, 37 F.2d at 435

As the Tribes argued to the District Court on remand, once this court rendered the forgoing opinion and the State allowed it to become final by not seeking certiorari within the time prescribed therefor, the rights and liabilities of the parties became fixed as both the law of the case and as res judicata as between the parties for all further proceedings. All that remained for the district Court to do on remand was to carry out this Court's "instructions to enter summary judgment in favor of the Bands."

Had the District Court done as this Court had instructed, and had the State not then acted in accordance with those instructions, the Tribes would have been entitled to do exactly what they attempted to do on the remand: move for further relief under 28 U.S.C. § 2202 for further relief in the form of summary judgment in their favor for the declaratory and monetary relief demanded in the original complaints.

Had events transpired as this Court had ordered, the circumstances leading to the present appeal would never have occurred. Instead, the Cabazon and Sycuan Bands were forced to seek further relief from the District Court in the form of a temporary restraining order to prevent the State from unilaterally abrogating their compacts and causing SCOTWInc. to terminate the simulcast signals upon which all simulcast facilities depend to operate, based upon the State's astonishing announcement that this Court's final judgment did not entitle the Tribes to payment, but rather somehow invalidated the compacts and excused the State from payment. Similarly, the Barona and Viejas Bands had to seek and obtain leave to intervene and the same temporary restraining order to prevent the same actions by the State directed toward them.

The District Court did grant the requested temporary restraining orders on June 30, 1995. CR 67. However, rather than implementing this Court's instructions on remand by granting the Tribes' simple motion for further relief under 28 U.S.C. § 2202, the District Court conditioned implementation of this Court's holding and instructions on remand upon the Tribes' filing of amended complaints and complaints in intervention alleging the State's violation of the compacts, thereby allowing the State to assert new affirmative defenses and counterclaims having nothing to do with the parties' rights and obligations as previously finally adjudicated by this Court. The District Court's reasoning was as follows:

> A motion under § 2202 is an appropriate method by which to resolve the State's claim that the

> Ninth Circuit decision was in some way so unexpected as to invalidate the compacts. This question is very much of a piece as the original declaratory relief action that the parties agreed to in the compacts. However, a motion under § 2202 is not the appropriate way to consider the Bands' claim that the State is now in breach of the compacts. This claim arises from actions by the State after the Ninth Circuit decision and involves a host of new issues, particularly the Stat's [sic] counterclaim or defense that its obligation to adhere to the compact has been voided by the Bands' alleged illegal activity. [cit.om.]
>
> Accordingly, the Bands must amend the complaints now on file to seek relief for breach of the compacts under IGRA. The State may then amend its answer to assert any defenses or counterclaims that it may have to this claim. The Court cannot resolve the Bands' claim to the funds and to continuation of the compacts on the basis of the pleadings now filed.
>
> Memorandum of Opinion and Order of July 12, 1995, p. 12, line 25 to p. 13, line 19; ER 12-13; CR 74, pp. 12-13

Requiring the Tribes to file amended complaints and complaints in intervention vastly and inappropriately expanded this litigation far beyond its original scope, which was simply to determine which of the two parties to the respective compacts, either the Tribes or the State, was entitled to receive the accumulated and future state license fee, and far beyond the scope necessary to implement this Court's decision and grant the Tribes the relief to which this Court determined they were entitled. To avoid this needless expansion and prolongation of the litigation, and its attendant cost and delay, the Tribes first

sought and failed to obtain further relief from the District Court under 28 U.S.C. § 2202. When that motion was denied, the Tribes sought reconsideration. When the District Court denied that motion, the Tribes petitioned this Court for a writ of mandamus, which was denied because this Court found that any errors by the District Court could be rectified by appeal.

Since January of 1995 the Tribes have been seeking no more than implementation of this Court's final, unappealed, and unappealable determination that "the Bands do indeed have a 'right' to the unpaid fees"[16] based on compact language, identical or equivalent for all four Tribes, that "the State shall pay over to Sycuan the amount of all state license fees previously distributed to the State under this Compact . . . ".[17]

Simple entry of judgment directing such payment is all that the District Court needed to do, and all that the District Court was empowered to do on remand to implement this Court's instructions. Thus, this Court can and should end this protracted litigation at this point by holding that the District Court erred in denying the Tribes' motion for further relief, and remanding again to the District Court with specific instructions to enter judgment in favor of the Tribes, expressly including an order to the State to account for and to pay to the Tribes the accrued and future state license fees generated at the Tribes' simulcast facilities since their respective inceptions, and to direct SCOTWInc. in the future to pay over

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[16] 37 F.3d at 434

[17] Sycuan Band Compact, paragraph 19(b)(3)

to the Tribes all money that would otherwise be distributed to the State as its license fees for the durations of the compacts.

Should this Court determine that the merits of the State's appeal need to be addressed further, the Tribes' responses to the State's arguments follow.

II.

THE DISTRICT COURT DID HAVE JURISDICTION TO ENFORCE THE TERMS OF THE COMPACTS.

The District Court concluded that it did have jurisdiction to hear the breach-of-compact claims that it had required the Tribes to file in amended complaints and complaints in intervention based on this reasoning:

> IGRA specifically provides that a Tribe may bring suit in federal district court against a State that fails to negotiate a compact in good faith. 25 U.S.C. §2710(d)(7)(A). It would be extraordinary were the statute to provide jurisdiction to entertain a suit to force the State to negotiate a compact yet provide no avenue of relief were the State to defy or repudiate that very compact. Such a gap in jurisdiction would reduce the elaborate structure of IGRA to a virtual nullity since a state could agree to anything knowing that it was free to ignore the compact once entered into. IGRA is not so vacuous. The statute provides that a compact may provide "remedies for breach of contract." §2710(d)(3)(C)(v). Here the compacts include a provision that "Judicial review of any action taken by either party under this Compact shall be had solely in the appropriate United States

> District Court." Further, the compacts all include provisions that the compact shall remain in force unless "determined to be invalid by a court of competent jurisdiction," that either party may bring suit to amend the compact in a "court of competent jurisdiction"; and that "the compact shall be governed by and construed in accordance with the laws of the United States." These provisions provide for an action for breach of the compact in federal district court just as IGRA envisions. Because IGRA expressly authorizes a compact to include remedies for breach of compact, and because IGRA's grant of jurisdiction to require good faith bargaining would be pointless were there no jurisdiction to enforce the compact, jurisdiction to enforce the compacts is created by IGRA and 28 U.S.C. §§1331 and 1362."
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> Memorandum of Decision and Order, July 12, 1995, p. 8, line 16 to p. 9, line23

In support of this conclusion, the District Court cites two appellate cases.

In *Sycuan Band of Mission Indians v. Roache,* 54 F.3d 535, 538 (9th Cir., 1995), this Court held that the District Court did have jurisdiction over an action by three of the very same tribal plaintiffs as those now before the Court, there seeking an injunction against the criminal prosecution of certain tribal officials. The stated basis for this jurisdiction was: "Section 1331 is enough; this case clearly arises under federal law, be it IGRA or the federal common law of Indian affairs that allocates jurisdiction among the federal government, the tribes and the states." This is the same conclusion reached by the Seventh Circuit in *Forest County Potawatomi Community v. Norquist,* 45

F.3d 1079, (7th Cir., 1995): "That right, if it exists, is a federal right whether its source is the IGRA, the Compact, the Indian Commerce Clause or federal recognition of the inherent sovereign powers of an Indian tribe."

In both of these cases, it was not necessary to determine whether the precise source of the right to be enforced was IGRA or federal common law or, in the second case, a tribal-state compact. In any event the source of the right to be enforced, if it existed at all, was unquestionably federal in nature. In the present case, the source of the Tribes' right to the payment of the disputed state license fee funds is either the above express language of the compacts, IGRA itself (as elucidated by the District Court), or the federal common law, in this case, most notably this Court's second opinion of 1994 in this very case. Under either *Sycuan, supra,* or *Forest, supra,* this is sufficient basis for federal question jurisdiction. Although the payment in question here does have a contractual aspect, it is not a purely contractual question, as the State claims, and rather originates not in contract but in the federal preemption of the imposition of that state license fee which this Court found to occur because "the Bands bear the actual burden of the license fee."[18] The contractual aspect of this question, however, is addressed by the language of 25 U.S.C. §2710(d)(3)(C)(v) authorizing compacts to include language on the issue of "remedies for breach of contract" to the extent that such a remedy is not otherwise provided.

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[18] 37 F.3d at 434

The State seems to contend that the District Court lacked subject matter jurisdiction because the Tribes' action was, in reality, nothing more than a garden-variety action for breach of contract, and thus not one arising under federal law. Alternatively, the State argues that the District Court lacked jurisdiction because no specific federal statute grants jurisdiction to District Courts to enforce compacts as political agreements made between State and Tribal sovereigns. (State's Opening Brief, pp. 14-15). The State may be correct that this is not a garden-variety action for breach of contract (although certain principles of contract interpretation may have aided the District Court in its interpretation of the language of the compacts), but that never has been the basis for the District Court's jurisdiction in this action.

What the State's argument ignores is that the original basis for the District Court's jurisdiction was the federal question of whether distribution to the State of the license fee on wages placed at the Tribal simulcast facilities is permissible under IGRA. The compacts themselves are creatures of federal law, and thus the subsequent proceedings have been nothing more than further proceedings to implement the judgment that the District Court should have entered in favor of the Tribes upon receipt of this Court's mandate. Where a District Court has subject matter jurisdiction over the subject matter of an action for declaratory relief, the District Court has jurisdiction to grant further relief in order to give effect to its declaratory judgment. *Horn & Hardart Co. v. National Rail Passenger Corp.*, 843 F.2d 546, 548 (D.C. Cir., 1987); *Omaha Indemnity Insurance Co. v. Cardon Oil Co.*, 687 F.Supp. 502 (N.D. Cal., 1988), *aff'd*. 902 F.2d 40 (9th Cir., 1990). Indeed,

28 U.S.C. §2202 allows a District Court to fulfill "the principle that every court, with few exceptions, has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective." *Horn & Hardart, supra,* 843 F.2d at 548.

For these reasons, the Tribes urge the Court to conclude that the District Court did have jurisdiction over the breach-of-compact claims that it required them to file as such.

III.

THE STATE DID WAIVE ITS IMMUNITY UNDER THE ELEVENTH AMENDMENT IN THIS CASE.

The District Court held that the State had waived any immunity it might have in this case under the Eleventh Amendment:

> The State has waived its Eleventh Amendment immunity in the compact language cited above.[19] *See Port Authority Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 305 (1990). The compact language clearly and unequivocally subjects the suit in federal district court. The *Port Authority* Court found waivers fo [sic] the Eleventh Amendment where the states involved expressly submitted to suit in either state or federal district court. *Id.,* at 307. Here the waiver is even more readily apparent, where the State agreed to suit in federal district court alone. The State's claim that the compacts only subject the State to

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19 This language appears on pp. 8-9 of the Memorandum of Opinion and Order of July 12, 1995, quoted above.

> suit for declaratory relief is not borne out by the compact language which provides for judicial review of "any action taken by either party under this Compact." This sweeping language waives immunity for suit to enforce the compacts.
>
> Memorandum of Opinion and Order, July 12, 1995, p. 10, lines 10-24

The State apparently concedes that it did waive its immunity in the initial phase of this case, through this Court's second opinion of 1994 and the remand order. But the State argues that, even if it did consent to declaratory relief against it concerning the propriety of the imposition of the state license fee, it did not consent to actual payment of the disputed sums, and certainly did not consent to surrendering the State's taxing power over the racing associations for the benefit of the Tribes.

The short answer to the State's position is that the State's waiver is not qualified or limited in any way except by the terms of the compact language itself. Nothing in that language circumscribes the District Court's power to effectuate the judgment mandated by this Court. Furthermore, even though the accrued state license fee funds themselves are held in the State Treasury, they are derived not from general state tax revenues but rather from the funds collected and distributed to the State Treasury by SCOTWInc. from wagers made at the Tribes' simulcast facilities on the contingent basis described in the compacts. The State has just made a long-term interest-free loan to itself of these third-party funds during the six-year pendency of this litigation.

As for the claim that the waiver did not extend to the actual payment of the disputed sums, the Tribes have already discussed how the focus of this litigation has *always* been on the Tribes' efforts to recover the disputed funds, precisely because deprivation of those funds is just the economic burden that this Court found to be preemptive. Had the State's waiver been only for a declaratory judgment as to the permissibility of the State's imposition of these fees on the Tribes, without any actual payment involved, then the action would have been advisory in nature, not a fit subject for a declaratory judgment, and presenting no case or controversy. But this Court has a duty *sua sponte* to review appeals for mootness, standing, jurisdiction, etc. even if the parties do not raise the issue. Because this Court apparently found no such defects, it presumably determined that the State's waiver in this case was sufficient to cover not only the academic determination of whether the imposition of the state license fee was permissible under federal law, but also the actual payment that was the subject of the remand. Therefore, the Tribes submit that the State's waiver of its Eleventh Amendment immunity was sufficient to cover all aspects of this case through the first appeal of 1994 and the intended remand to implement the mandate of this Court.

As for the claim that the State's waiver cannot be construed as a surrender of the State's power to tax the racing associations, the Tribes' primary response is that the State mischaracterizes the issue. The real issue on this appeal is what it has always been: did the District Court have the power to implement the judgment which this Court directed it to implement? Again, the State refuses to accept this Court's conclusion that "State law does not

govern this case, however. Rather, the terms of the compact control."[20] Instead, the State attempts to re-assert state law arguments which this Court has already rejected. The compact language controls, and that language simply does not say that the State is obligated to pay the disputed funds only if the state license fee is determined to be a forbidden tax on the tribes. That language does not distinguish among the various bases on which this Court could have determined that the Tribes are entitled to the disputed funds. Although framed in several ways, the State's position here is just an attempt to evade its responsibilities under the language of the compacts to which it agreed, and to relitigate the merits of the issues determined by this Court in its second opinion of 1994.

The Tribes' secondary response to this claim is that the same could be said even if the basis for a decision favorable to the Tribes by this Court on the merits of which party was entitled to the disputed funds had been that the state license fee was a direct tax on the Tribes forbidden by IGRA. In either case, no matter what the basis of the Court's favorable opinion had been, the State would still be in the position of paying the Tribes the sums collected as the state license fee from wagers placed at the Tribes' simulcast facilities: "the State shall pay over to Sycuan the amount of all state license fees previously distributed to the State under this compact . . . " (Sycuan Band Compact, paragraph 19(B)(3).

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[20] *Cabazon Band of Mission Indians v. Wilson*, 37 F.2d 430, 434 (9th Cir., 1994

Therefore, the District Court properly concluded that the State waived whatever immunity it might have had under the Eleventh Amendment, and this Court should do the same.

IV.

THE DISTRICT COURT DID NOT ERR IN REJECTING THE STATE'S REQUEST TO PRESENT EVIDENCE AS TO THE PARTIES' SUPPOSED INTENT REGARDING THE LANGUAGE OF PARAGRAPH 19(B)(3) OF THE COMPACTS.

The State claims that the following critical compact language is susceptible to more than one meaning, is sufficiently ambiguous to justify a factual inquiry into its meaning, and is a genuine issue of material fact so as to preclude summary judgment:

> In the event a final judgment is obtained that the deduction and distribution of the state license fee is **impermissible under the** [Indian Gaming Regulatory] **Act,** and following the exhaustion of all appellate review, the State shall pay over to Sycuan the amount of all state license fees previously distributed to the State under this compact . . .
>
> Sycuan Band Compact, paragraph 19(B)(3), emphasis added

The State claims that the parties intended **impermissible under the Act** to mean only impermissible under IGRA in the sense that the state license fee amounted to a tax on the Tribes, as specifically forbidden by 25 U.S.C. §2710(d)(4).

This language is clear and unconditional on its face. It certainly does not even suggest such a limited reading as the State urges. For this reason, the Tribes urge the Court to conclude that the State is attempting to re-litigate this Court's controlling opinion in *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir., 1994), and particularly the Court's remand to the District Court "with instructions to enter summary judgment for the Bands."[21] Presumably, if this Court believed that the above critical language was ambiguous, then such a remand for entry of summary judgment would have been ambiguous.

Nor is it logical to believe that the parties might have intended this cramped meaning of otherwise clear and unambiguous language. When the parties negotiated the above language in their compacts and litigated this case, they had no idea what its eventual outcome might be, beyond a common belief that the issue of to which party the disputed sums belonged would be resolved. Neither party could predict the exact basis on which the Court might choose to rest its decision. That is why the critical language is unqualified: **impermissible under the Act** is intentionally broad enough to cover virtually any analysis that the Court might adopt in resolving the basic issue of to which party does the disputed fund belong. To suggest now that this otherwise unambiguous and unqualified language is actually ambiguous because of a meaning secretly attributed to it by one party strains the bounds of credulity. If the State had intended this strained meaning of **impermissible under the Act,** it

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[21] 37 F.3d at 435.

could and should have negotiated other language which reflected this intention.

This result, that the parties to a compact must live with the terms that they have negotiated, is reflected in both case law and the legislative history of IGRA that authorized the compacts:

> At this point, plaintiff must settle for the compact to which it agreed. The intent of the Indian Gaming Regulatory Act was to provide a framework by which Indian tribes and states would work together to provide a mutually agreeable plan for Indian gaming. As stated in the Senate Report,
>
> "[t]his legislation is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied." S.Rep. No. 100-446 at 6, 1988 U.S.C.C.A.N. at 3076.
>
> This congressional purpose is undermined if either a tribe or a state can go back on the terms agreed to in the compact in the absence of compelling reasons.
>
> *Wisconsin Winnebago Nation v. Wisconsin*, 824 F.Supp. 167, 172 (W.D. Wisc., 1993)

This case is especially apt because it is an example of a federal court rejecting a claim by a party to a compact that an unanticipated judicial interpretation of the terms

of a compact should serve as the basis for reopening the compact.

At the bottom half of p. 31 of the State's opening brief, the State advances an argument which the Tribes cannot fathom. The heart of the argument seems to be that "the Tribes" 'right' to the unpaid fees is dependent upon a determination that collection of the license fee is impermissible; *i.e.*, the 'right' does not arise *unless* the tax is impermissible." But this Court has already determined that "the Bands do indeed have a 'right' to the unpaid fees"[22] and did so without any qualifications or linkage to a finding that the state license fee is preempted by federal law in this case. Likewise, at the end of its analysis, when this Court concluded that "The express objectives of IGRA, when combined with the Bands' interests, preclude the application of the State's license fee",[23] there was no linkage to the previous finding that the Tribes have a "right" to the disputed funds, and that conclusion of federal preemption was not conditional on any such finding. Thus, at most, the State's argument on this point is circular; at worst disingenuous.

The State's somewhat similar, but equally circular, argument at pp. 32-33 fails for the same reasons. The Tribes will only add that the Court's determination that "the Bands do indeed have a 'right' to the unpaid fees" is definitely not dicta, but rather is an essential predicate to the Court's conclusion, in the next sentence, that "The

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[22] 37 F.3d at 434.

[23] 37 F.3d at 435.

licensing scheme currently imposed thus constitutes an economic burden"[24] and thus is preempted.

The State's protest, at p. 34, that "the district Court's construction of Paragraph 19(B)(3) will expose the State to suit by those whose property has been taken without due process of law . . . " is simply not so. This Court already rejected this same argument:

> The district court reached a conclusion opposite from our own, reasoning that under California law, surplus revenue is to be divided between the racing association and the horsemen. Cal. Bus. & Prof. Code §§ 19605.8 & 19606. . . .
>
> State law does not govern this case, however. The terms of the compact control
>
> *Cabazon band of Mission Indians v. Wilson*, 37 F.3d 430, 434 (9th Cir., 1994)

To the extent that the racing associations may make such a claim against the State, the State is amply protected by this Court's above determination that the terms of the compacts prevail over conflicting provisions of state law. This is the essence of federal preemption. The California Supreme Court has recognized such federal preemption in the field of Indian affairs in *Boisclair v. Superior Court*, 51 Cal.3d 1140, 1150 (1990). Given this Court's explicit determination of federal preemption regarding the very issue previously litigated, there is no reason to believe that the California courts will be any less receptive to a conclusion of federal preemption if the racing associations bring any such claim as the State fears.

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[24] 37 F.3d at 434.

Because this critical language from all of the compacts is clear, unambiguous, and unqualified on its face, the Tribes urge the Court to conclude that the District Court did not abuse its discretion by refusing to conduct an evidentiary inquiry into what one party's unstated intentions were. In any event, this Court has already considered the compact language claimed to be ambiguous and has determined that the disputed state license fee is impermissible under the Act. Furthermore, in an attempt to avoid this Court's holding on the merits, the State advanced all these arguments in its petition for rehearing, which this Court rejected. For all these reasons, there is now no basis for a claim that the district Court abused its discretion by not allowing the State to present evidence to support an argument already definitively rejected by this Court once on the merits, and once in denying rehearing.

V.

THE DISTRICT COURT WAS CORRECT IN DISMISSING THE STATE'S COUNTERCLAIM THAT THE COMPACTS ARE INVALID BECAUSE THE WAGER DISTRIBUTION FORMULA DOES NOT SEEK TO DEPRIVE OTHERS OF THEIR STATUTORY SHARES.

In part IV of its Opening Brief, the State claims that the District Court erred in dismissing the State's third counterclaim which asserted that the compacts must all be invalid because the racing associations derive a greater financial benefit from the simulcast wagering than do the Tribes, so that the Tribes are not the "primary beneficiaries" of the simulcast activity. The argument seems to be that, to be valid, a compact must allocate revenues in

such a way that a tribe must derive more funds from the gaming activity than any other party who receives any funds under the compact. Such a claim is simply wrong.

The reference to the tribe being the "primary beneficiary" of the gaming operation is in IGRA's Congressional declaration of policy: "The purpose of this chapter is – . . . to insure that the Indian tribe is the primary beneficiary of the gaming operation . . . " 25 U.S.C. §2702(2). This Court cites and relies on this language at p. 433 of its second 1994 opinion. To understand what this language means requires a bit of history.

Before IGRA was passed in 1988, various unscrupulous non-Indian managers had entered into management contracts with certain tribes for very long terms of years and with high percentages of the net profit paid to the manager. Such contracts were subject to the requirement of 25 U.S.C. §81 that they be approved by the Secretary of the Interior to be valid. Some which lacked such approval were invalidated by this Court. For example, one of the current Tribes sought invalidation of such an unapproved management contract in *Barona Band of Mission Indians v. American Management & Amusement, Inc.* 840 F.2d 1394 (9th Cir., 1987). This Court invalidated the contract for, among other things, having a term of 25 years when the then current pre-IGRA guidelines for approval limited such terms to 5 years, and limited the percentage payment to the manager to 49% when those guidelines limited such fees to a lesser percentage. *Id.*, 840 F.2d at 1406-7.

It was against this kind of overreaching by non-Indian managers that Congress acted in IGRA expressly

to limit the term of management agreements to 5-7 years and management fees to 30-40%, and added several other similar protective measures:

> The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least –
>
> (1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;
>
> (2) for access to the daily operations of the gaming to appropriate tribal officials who shall have a right to verify the daily gross revenues and income made from any such tribal gaming activity;
>
> (3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;
>
> (4) for an agreed ceiling for the repayment of development and construction costs;
>
> (5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but that does not exceed seven years [under stated conditions] . . .
>
> 25 U.S.C. §2711(b)

Similarly, 25 U.S.C. §2711(c) limits managers' fees to 30-40%. The Senate Committee Report reflects the protective purpose of these limitations:

> Some of the [management] contracts, approved or not, have been shown to be clearly unconscionable, and the members of the Committee

> believe that term of years and fee percentages set forth in the bill are adequate to protect any legitimate investor.
>
> Senate Report No. 100-446, 100th Cong., 2nd Sess., p. 15, August 3, 1988; reprinted in vol. 5 of 1988 U.S.C.C.&A.N. 3071, 3085

It was in this protective sense that Congress intended that tribes be the "primary beneficiaries" of their gaming enterprises. Congress simply wanted to eliminate the unconscionable terms found in some pre-IGRA management contracts by requiring approval of such contracts only if they met the stated minimum federal standards so as to benefit and protect the tribes.

Thus, what Congress had in mind in IGRA was simply establishing a set of minimum federal standards for the Chairman of the National Indian Gaming Commission to use to determine whether to approve a management contract or not. These standards would insure that the tribe was the "primary beneficiary" of the gaming operation under IGRA, rather than the non-Indian manager as was often the case pre-IGRA. This language does not mean that any arrangement is invalid if any other party happens to derive more financial benefit from the operation than does the tribe. The intended limitation is on the non-Indian manager whose pre-IGRA over-reaching was the reason for the limitation on him. In the context of simulcast wagering on horse races, it makes much sense for the racing associations (which operate the racetracks and all their support facilities) and the horsemen (who provide the horses, their training, board, care, etc.) to split whatever amounts are left over after all the statutory deductions because those two groups have by

far the greatest expenses in staging the races. If those two groups wind up receiving more in absolute dollars than do the Tribes, it is because they have much greater expenses.

This is also the sense in which this Court has used the term "primary beneficiary" on p. 433 and p. 435, fn. 2 of its second 1994 opinion. There the Court compares the amounts received by the Tribes with those received by the State, but not with the amounts received by any other party. There is no non-Indian manager in the case of a compact, unlike a management contract, but the idea is the same: to guarantee that the tribe is the "primary beneficiary" of the gaming enterprise *as compared with the other party with whom the tribe is negotiating,* whether that other negotiating party is a non-Indian manager or a state. In either case, Congress wishes to limit over-reaching by whichever other party is negotiating with a tribe. Congress simply did not address the issue of whether a major vendor who was not a manager (and whose prices are largely fixed in advance) could wind up deriving more economic benefit from a tribal gaming operation than a tribe. Congress did address the issue of overreaching by a party who does negotiate with a tribe and whose economic benefits from the arrangement are fixed through that negotiation.

It is strange that the State would even make this argument. Would the State really have preferred if the negotiating tribes had demanded that the State agree to reduce the statutory amounts that other parties involved in simulcast wagering receive? Doing so would have produced the same kind of taking of property which the State says it so wishes to guard against. Instead, all that

has happened is that the Court has determined that, within the overall complex statutory scheme for the distribution of various percentages of the handle from simulcast wagering to many parties, one item (the state license fee of 1-4%) has been preempted so that it and it alone goes to the Tribes, rather than to the State. Doing so does make the Tribes the "primary beneficiaries" of their simulcast operations, *as compared with the State*. No more is required.

Furthermore, as each of the various recipient groups or organizations except the State, takes its statutorily-prescribed percentage of the handle, that recipient is effectively being compensated for goods actually provided or services actually rendered to the Tribe[25] as the operator of a simulcast facility. Only the State itself is not effectively a vendor in this overall scheme. Only the State can be viewed as providing anything like management services, and that in the sense of the State providing the same degree of regulation and oversight of the Tribes' simulcast facilities as it does to other such facilities, and being compensated separately under paragraph 19(b) of the compacts, *in addition to the disputed State license fee*, for doing so. In this additional sense, it is appropriate for the determination of who is the "primary beneficiary" of the simulcast operation to consider only the Tribes and the

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[25] Such services are rendered either directly to the Tribe, such as with SCOTWInc. which receives 1% for transmitting the simulcast signal, handling parimutuel wagers, etc., or indirectly, such as with the one-tenth of 1% that goes to equine research at the California Veterinary diagnostic Laboratory System under B&P §19610.2, which research benefits the horse racing industry in general, including the Tribes' simulcast operations.

State. In approving the subject compacts, the Secretary of the Interior has determined that the costs to the Tribe of participating in the simulcast system, according to the terms of the compacts, are reasonable, and the State has no standing to complain that the Tribes' participation in the system is more costly to the Tribes than the State thinks appropriate.

VI.

THE DISTRICT COURT DID NOT ERR IN DISMISSING THE STATE'S COUNTERCLAIM TO ENJOIN THE TRIBES' SUPPOSEDLY ILLEGAL ACTIVITIES OUTSIDE THE SIMULCAST ENCLOSURES.

A. By its counterclaims, the State seeks to re-litigate *Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache,* 54 F.3d 535 (9th Cir., 1995).

The State participated as an amicus curiae in *Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache, et al.,* 54 F.3d 535 (9th Cir., 1995). In that case, this Court upheld the District Court's injunction prohibiting the San Diego County District Attorney from prosecuting those arrested in conjunction with raids staged by the San Diego County sheriff at the gaming establishments of three of the present four appellee Tribes. The basis for doing so was this Court's determination that, with the passage of IGRA, California's gambling laws had become federalized, with jurisdiction to enforce them *exclusively* in the United States except as the affected Tribes and the State might provide otherwise in a tribal-state compact covering the locations in question.

When the District Court in the present case required the Tribes to file amended complaints and complaints in intervention, the State filed a counterclaim seeking an injunction against the Tribes to restrain them from engaging in the very same allegedly illegal activity as was the subject of *Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache,* 54 F.3d 535 (9th Cir., 1995). By this counterclaim, the State attempted vastly to expand the scope of the present litigation so effectively to relitigate *Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache, supra.* For the following reasons, the State should not be permitted to evade both its loss in *Sycuan v. Roache, supra,* and the sovereign immunity of the Tribes as to matters far beyond the scope of the Tribes' present narrow claims.

B. The District Court jacked [sic] **personal jurisdiction over the Tribes as to the State's counterclaims due to Tribal sovereign immunity.**

Even in their expanded form in the amended complaints and complaints in intervention, the Tribes' claims in the present case are simple and narrow. In their first claims for relief, the Tribes seek a declaration that IGRA preempts the State's license fee on the handle of their simulcast operations within their respective simulcast enclosures and that the sums stated in the compacts are due to the Tribes, plus an accounting and actual payment of those amounts, as directed by this Court in its second 1994 opinion in this case. In their second claim for relief, the Tribes seek a declaration that the State's failure to abide by the mandate of this Court in *Cabazon Band v. Wilson, supra,* deprives the Tribes of property under color

of state law in violation of 42 U.S.C. § 1983, plus attorneys' fees under 42 U.S.C. § 1988. That is all. The Tribes ask for no relief concerning any other matter beyond these points growing directly out of the State's collection of its license fee on the handle of simulcast wagering within the simulcast enclosures at the Tribes' respective simulcast facilities. The Tribes do not even mention any supposed other forms of class III gaming which the State alleges to be occurring, but outside the simulcast enclosures which are governed by the Tribes' respective compacts.

The Tribes' moved for dismissal of this extraneous counterclaim in the District Court based on *McClendon v. U.S.*, 885 F.2d 627 (9th Cir., 1989). In *McClendon*, the United States, on behalf of a tribe, had sued the predecessors in interest of the McClendons to eject them from land which the United States claimed was part of the tribe's reservation. This initial action was a simple ejectment action seeking to establish title to the land in the United States in trust for the tribe. That litigation was later settled by a consent decree to the effect that all parties agreed that the land in question was a part of the tribe's reservation, but the Tribe agreed to lease it to the McClendons on favorable terms. Later, the McClendon's brought an action against the tribe and its trustee the United states seeking a declaration that certain actions by the tribe constituted a breach of the lease. The McClendon's argued that, by having its trustee initiate the previous ejectment action, the tribe had consented to suit regarding the interpretation of the lease. This Court rejected this claim:

> McClendon argues that the 1972 suit constituted a waiver of immunity against actions to enforce the terms of the lease agreement. . . . The 1972 action merely sought a declaration of land ownership. . . . By initiating the 1972 action, the Tribe merely consented to the court's jurisdiction to decide ownership of the land in question. The initiation of the suit, in itself, does not manifest broad consent to suit over collateral issues arising out of the settlement of the litigation, such as interpretation or enforcement of the lease agreement. [cit.om.] We conclude that disputes over interpretation of the 1984 lease agreement are collateral disputes, and are not so inextricably linked with the 1972 suit that initiation of the latter, in itself, constitutes consent to suit over the former.
>
> *McClendon v. U.S.*, 885 F.2d 627, 630-631 (9th Cir., 1989)

This Court in *McClendon* reached this conclusion based on the well-established principle that, when initiating a suit, a sovereign necessarily consents to the jurisdiction of the court to decide all issues raised by the sovereign's complaint, but not related issues whose resolution might be desirable, but which go beyond the scope of the original complaint. In rejecting a claim that that [sic] it was unfair to allow a sovereign thus effectively to define the scope of its waiver of its sovereign immunity, this Court expressly relied on what the Supreme Court had to say on the subject:

> McClendon argues that allowing the Tribe to sue without exposing itself to suit for related matters is unfair. However, as the Supreme Court

> has noted, "[t]he perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances. *Three Affiliated Tribes v. Wold Eng'g.*, 476 U.S. 877, 893, 106 S.Ct. 2305, 2314, 90 L.Ed.2d 881 (1986).
>
> *McClendon, supra,* 885 F.2d at 631

This result in *McClendon* should come as no surprise. It is well-settled that, by filing an action, a tribe does not consent to a counterclaim against it, even if that counterclaim would be otherwise compulsory under Rule 13:

> Petitioner acknowledges that Indian tribes generally enjoy sovereign immunity, but argues that the Potawatomis waived their sovereign immunity by seeking an injunction against the Commission's proposed tax assessment. It argues that, to the extent that the Commission's counterclaims were "compulsory" under Federal Rule of Civil Procedure 13(a), the District Court did not need any independent jurisdictional basis to hear those claims.
>
> We rejected an identical contention over a half-century ago in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-512, 60 S.Ct. 653, 655-656, 84 L.Ed. 894 (1940). In that case, a surety bondholder claimed that a federal court had jurisdiction to hear its state-law counterclaim against an Indian Tribe because the Tribe's initial action to enforce the bond constituted a waiver of sovereign immunity. We held that a tribe does not waive its sovereign immunity from actions that could not otherwise be

> brought against it merely because those actions were pleaded in a counterclaim to an action filed by the Tribe. *Id.*, at 513, 60 S.Ct., at 656. "Possessing . . . immunity from direct suit, we are of the opinion [the Indian nations] possess a similar immunity from cross-suits." *Ibid.*
>
> *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)

Therefore, since the Tribes have not consented to State's counterclaims, either by initiating this action or otherwise, the District Court should have dismissed them as barred by the Tribes' sovereign immunity. This is especially so when the subject of those counterclaims goes far beyond the narrow scope of the Tribes' claims.

In addition, the Tribes also argued to the District Court that entertaining these counterclaims, with their allegations that the Tribes are engaged in forms of class III gaming without the benefit of a compact, is inconsistent with the language of IGRA. 25 U.S.C. §2710(d)(7)(A)(ii) confers on the district courts jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands *and conducted in violation of any Tribal-State Compact entered into under paragraph (3) that is in effect.*" (emphasis added) By negative implication, Congress intended that the district courts would *not* have jurisdiction over such claims if no such compact regarding such gaming is in effect, as alleged by the State; such jurisdiction exists *only* if such a compact *is* in effect. This is one of the incentives for a State to enter into such a compact in the first place.

However, the District Court did not accept these arguments. Instead, it found a waiver of Tribal sovereign immunity in the following language from the compacts: "Judicial review of any action taken by any party under this Compact, or seeking an interpretation of this compact, shall be had solely in the appropriate United States District Court."[26] For the following three reasons, the Tribes submit that this language does not amount to such a waiver of Tribal sovereign immunity as to the State's counterclaims.

First, even if this language is a waiver, it is a waiver only as to "any action taken by any party *under this Compact.*" (emphasis added). As a factual matter, it must be pointed out that the geographical scope of the simulcast compacts of the four Tribes is limited by their terms to only the simulcast enclosures.[27] The compacts allocate

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[26] Memorandum of Opinion and Order, April 26, 1996, p. 16, lines 1-12.

[27] One of the recitals in each such compact is that both the State and the affected tribe "each recognize the sovereign authority and interests of the other in regulating gaming activities within their respective areas of jurisdiction" (Barona Compact, p. 1, fifth Whereas clause). By this recital, the State has recognized that, outside that portion of the affected tribe's reservation that makes up the simulcast enclosure, the State has no interest or jurisdiction to regulate any form of gaming on that tribe's reservation.

Similarly, the Barona Band's compact is replete with references which limit the State's authority under the compact to *only* that simulcast enclosure, and to no area or activity outside it. For example, in recognition of the fact that, when the compact was executed in 1992, the Barona Band already had a bingo facility constructed and operating, and a card room under construction, while the simulcast facility was still in the

regulatory jurisdiction largely to the State for activities occurring within those simulcast enclosures, but nowhere

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planning stage, paragraph 6.2, p. 2, of the Barona Band's compact recites these facts and requires the approval of the California Horse Racing Board for *only* the planned simulcast facility, and *not* for the existing bingo hall or the card room then under construction:

> *Modification of Present Gaming Facility.* Barona presently operates a gaming facility, known as Barona Indian Gaming. . . . In this 2,200-seat hall, Barona now offers bingo. Now under construction and expected to open in July of 1991[2] is an addition to this existing structure in which Barona plans to offer various Class II card games under the same roof. Subject to the Board's approval, Barona is now preparing plans and specifications for the remodeling of a portion of the existing structure to accommodate simulcast wagering. At its early convenience, the Board will review the plans and specifications for the intended simulcast facility and will inspect the existing facility. If the Board finds that the plans for the simulcast facility comply with the substantive requirements of Title 4, Code of California Regulations, Article 24, Sections 2058(e) and (f), or the then applicable requirements for approving simulcast facilities, and the applicable building and construction codes, the Board shall approve the new Barona facility, provided that it is constructed in accordance with the approved plans and specifications, and in conformity with the applicable uniform codes.

Similarly, paragraph 9, p. 4, of that compact grants to the State the right of entry onto the Barona Indian Reservation not to inspect the entire gaming establishment, but only "for purposes of inspecting its simulcast facility . . . ". Regarding licensing of personnel, paragraph 14, p. 5, of the Barona compact requires "Every person employed *in the simulcast facility* on the Barona Indian Reservation required to be licensed pursuant to Section

else on the Tribes' respective reservations. The alleged activities which are the subject of the State's counterclaim all occur *outside* the simulcast enclosures, elsewhere on the Tribes' reservations. Thus, such activities (if they occur at all, and the Tribes deny they occur) occur *outside* the simulcast enclosures and thus beyond the reach of the compacts. Therefore, even if the language relied upon by the District Court constituted a waiver of Tribal sovereign immunity, that waiver was effective only for actions taken "under this Compact." The actions of which the State complains supposedly occur only outside the simulcast enclosures, and thus not "under this Compact." If the State wishes regulatory and other control for areas on the reservations but outside the simulcast enclosures, then the Tribes will be glad to discuss with the State the terms of such a second compact.

Second, it is well-settled that any waiver of Tribal sovereign immunity must be "express and unequivocal"[28], rather than implied or ambiguous. The Tribes must

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1481 of the Board's Rules" (emphasis added) to "hold a valid license issued by the Board", while those hundreds of employees working at the Barona Band's other gaming activities under the same roof are not similarly required to obtain State-issued licenses. More importantly, paragraph 16.a., p. 5, of the same compact extends the State's civil regulatory jurisdiction "specifically pertaining to the conduct of simulcast wagering" not to entire Barona Indian Reservation or to other parts of the gaming enterprise, but rather only to "the simulcast wagering facility established or operated by Barona on the Barona Indian Reservation".

[28] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Waivers of any sovereign's immunity must be strictly construed. *U.S. v. Nordic Village, Inc.*, ___ U.S. ___, ___; 112 S.Ct.

assert that, especially when viewed in light of the geographical limitation on the scope of the compacts, this

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1011, 1015 (1992); *U.S. Department of Energy v. Ohio*, ___ U.S. ___, ___; 112 S.Ct. 1627, 1633 (1992). Waivers of tribal sovereign immunity are also strictly construed because the sovereign immunity of tribes is coextensive with that of the United States. *Evans v. McKay*, 869 F.2d 1341, 1345 (9th Cir., 1989). For example, the Eighth Circuit has held that a sue-and-be-sued clause in a tribal housing authority's charter waives its immunity for contract claims, but not for tort claims. *Rosebud Sioux Tribe v. Val-U Construction Co.*, 50 F.3d 560, 563 (8th Cir., 1995). See also *American Indian Agricultural Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379-1380 (8th Cir., 1985) for a discussion of similar distinctions.

Any waiver provided by the Tribes in the above compact language extends only to: "judicial review of any action taken by either party *under this Compact*, or seeking any *interpretation of this Compact*" (emphasis added). The State's counterclaims relate to matters outside the scope of the compacts, as noted in fn. 24 above. In contrast, the counterclaims relate to other forms of gaming that occur, if at all, *outside* the scope of the present compacts because they occur, if at all, *outside* the simulcast facilities. Thus, the State's counterclaims do not arise "under this compact" and do not require any "interpretation of this Compact." For this reason, the compacts do not provide an unequivocal waiver of the Tribes' sovereign immunity as to the State's broad counterclaims regarding activities which occur, if at all, *outside* the simulcast facilities, and therefore *outside* the scope of the compacts.

In contrast, the Tribes' present narrow claims *do* arise under the compacts. Each Tribe seeks enforcement of the State's promise to pay to the respective Tribe the past and future license fees generated at the respective simulcast facilities, *as was specifically provided for in the express language of each compact*, and as this Court has held. The State's duty to make this payment is a direct *interpretation* of the specific and explicit language of the compacts for activities which do occur within the simulcast enclosures and therefore within the scope of the compacts. For

language does not meet the standard of "express and unequivocal" waiver. It could just as easily be viewed as no more than a venue provision.

C. The District Court properly dismissed the States' counterclaims for failure to state a claim upon which relief could be granted.

Although the District Court did not dismiss the States' counterclaims for lack of personal jurisdiction over the Tribes, it did dismiss those counterclaims for failure to state a claim, based on the following reasoning:

> The first counterclaim asks for a declaration that the tribes are violating the compacts be [sic] engaging in unauthorized gaming, and seeks an injunction against future violations. However, as explained above, the compacts contain no such implied promises [regarding gaming outside the simulcast enclosures] and to read them into the compacts would violate the policy and language of IGRA. Further the State's authority to seek injunctions under 25 U.S.C. §2710(d)(7)(A)(ii) is restricted to suit to enjoin class III gaming that is in violation of the terms of a tribal-state compact. The State therefore has no basis for seeking the requested injunctive relief and declaratory relief. The counterclaim must be dismissed as a matter of law.

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these reasons, the Tribes submit that, while their modest and narrow claims do fall within the scope of the waiver language of the compacts, the State's much broader and far-reaching counterclaims do not.

Memorandum of Opinion and Order, April 26, 1996, p. 16, lines 15-26

The District Court was certainly correct in this conclusion. The compacts contain no express promise by the Tribes as to what forms of gaming, if any, the Tribes will or will not engage in *outside the simulcast enclosures.* The State does not even claim there is any such language. Instead, the State would have the Court imply such a promise on which it could base a counterclaim.

But the bargaining process is not so easily circumvented. Had the State desired such an express promise, it could have negotiated for one, but did not do so. Implying such language into this compact where the parties did not negotiate it would also do violence to this Court's definitive interpretation of the critical jurisdictional provisions of section 23 of IGRA, 18 U.S.C. § 1166(d), in *Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache,* 54 F.3d 535, 540 (9th Cir. 1995). Implying such a promise under these circumstances would circumvent this Court's holding in *Sycuan* by indirectly providing to the State the ability to regulate a tribe's gaming activities on its reservation in the absence of a compact so providing, when this Court has held in *Sycuan, supra,* that a compact is the *exclusive* means by which a state may acquire regulatory jurisdiction over gaming on any portion of a federal Indian reservation. As the District Court recognized in rejecting this argument when framed as an affirmative defense of unclean hands:

> In light of the strong federal policy to limit the reach of state authority over tribal affairs to matters specifically covered in the tribal-state compact, the State's unclean hands defense fails.

> Enforcement of IGRA's prohibition against class III gaming that is not covered by a compact is a matter solely within federal control where, as here, the compacts are silent on the subject. As with the claim of implied covenants discussed above, to allow the State to assert alleged illegal class III gaming as an equitable defense would be, in effect, to extend state regulatory authority over matters as to which Congress has denied the states jurisdiction except through the compact and the agreement of the tribes.
>
> Memorandum of Opinion and Order, April 26, 1996, p. 13, lines 2-13

For all three of the above reasons, the district Court [properly dismissed the State's counterclaims.

CONCLUSION

For the reasons stated above, the Tribes urge the Court to affirm the actions of the District Court as noted above, either on the grounds of the District Court or any grounds fairly presented by the Tribes or on this record, and to re-remand this case to the District Court with very specific directions for entry of judgment, with declaratory and injunctive relief, including actual payment of the accrued and future disputed funds, to the Tribes.

Dated: December 30, 1996

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth circuit [sic] Rule 32(e)(4), I, Art Bunce, hereby certify that the Brief of Plaintiff-Appellee Tribes in Appeal by State Defendants-Appellants is double-spaced (except for quotations and footnotes), proportionately spaced, with a typeface of 12 points, and contains 11,548 words.

Dated: December 30, 1996

/s/ Art Bunce
Art Bunce

PROOF OF SERVICE BY MAIL

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I declare under penalty of perjury that the foregoing is true and correct.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CABAZON BAND OF MISSION INDIANS, et al., Plaintiffs-Appellees, **vs.** **PETE WILSON, et al.** Defendants-Appellants.	Nos. 96-16432, 96-16443

On Appeal from the United States District Court
for the Eastern District of California
No. CIV-S-90-1118 DFL
The Honorable David E. Levi, Judge

REPLY BRIEF OF APPELLANT RACING ASSOCIATIONS (PROPOSED DEFENDANT INTERVENORS)

(Filed Jan. 14, 1997)

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INTRODUCTION

The tribes make much of the fact that this case is about money, as if the property interests of the racing associations, unlike the entrepreneurial commercial endeavors of the tribes, are unimportant to the resolution of this case. The tribes also contend that the disputed tax revenues would "make a difference" in the level of governmental services provided by the tribes. The racing associations do not contend that a recitation of such unsubstantiated facts are relevant to the outcome of this litigation, but, simply to respond to the tribes, will point out several additional facts which are equally true.

First, the racing associations, as corporate citizens of the United States, have asserted constitutionally protected rights. Moreover, under state law, the racing associations generate millions of dollars for non-profit charitable organizations.[1] In addition, the racing associations and other racing industry participants generate over $100 million in tax dollars for the benefit of both the State and local governments.[2]

In contrast, the Cabazon, Sycuan, Viejas, and Barona Bands of Mission Indians, with a combined population of just over 800 members,[3] are claiming $11 million dollars

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[1] See, California Business and Professions Code sections 19550-19557.

[2] See, *Statistical Report of Operations for the Year 1995* (California Horse Racing Board). (Charity Day distributions for 1995 – $1.6 million; total license fees paid to the State by the racing industry – $106 million.)

[3] Hereinafter collectively referred to as the "tribes." Cabazon Band, 25 members; Sycuan Band, 120 members; Viejas

in racing association revenues, and have generated untold millions of dollars from Class III gambling operations conducted without a compact since 1992.[4]

The tribes oppose intervention of the racing associations in this matter, not on substantive grounds, which they refuse to even address, but rather because the racing associations awaited the outcome of the dispute over the tribes' claim that the State was unlawfully taxing the tribes before seeking intervention. As explained more fully herein, the racing association interests are legally and substantively significant and their intervention is fully consistent with the requirements for intervention set forth in the Rules of Civil Procedure. Accordingly, the racing associations urge this Court to grant this appeal.

ARGUMENT

I. THE MEASURE OF WHETHER THE MOTION TO INTERVENE WAS TIMELY MUST BE TAKEN FROM THE DATE THE TRIBES CLAIMED ENTITLEMENT TO TAX REVENUES IMPOSED ON THE RACING ASSOCIATIONS, AND NOT FROM THE INCEPTION OF THIS MATTER, WHICH CONCERNED ONLY WHETHER THE STATE WAS IMPROPERLY TAXING THE TRIBES.

The District Court's summary denial of the racing associations' motion to intervene was based solely on

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Band, 213 members; Barona Band, 450 members. (*Tribal Information and Directory*, Sept. 1995, Bureau of Indian Affairs.)

[4] See this Court's opinions in *Rumsey Band of Wintun Indian v. State of California, et al.*, 64 F.3d 1250 (9th Cir. 1994) and *United States v. EC Investments*, 77 F.3d 327 (9th Cir. 1996).

timeliness. The lower court made no findings with respect to the timeliness issue other than to hold that "the motion comes very late in these proceedings and long after proposed intervenors should have known about any interest they may have in the outcome of this litigation."[5] Under the law in the circuit, the district court's denial of the intervention motion on timeliness grounds is reviewed for abuse of discretion.[6]

The three criteria for determining whether a motion to intervene is timely are also set out in the *McGough* case and are to be construed broadly in support of intervention.[7] They are: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for any length of the delay. The only ground cited by the District Court was the first, i.e, that the motion was filed too late in the proceedings.

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[5] Excerpt of Record ("ER") 20-21.

[6] *U.S., ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391 (9th Cir. 1992). In their opening brief, the racing associations noted that review of a motion to intervene as of right is reviewed de novo by the appellate court. (Brief, pp. 14-15; *United States v. Oregon*, 839 F.2d 637 (9th Cir. 1988).) Although the assertion is correct, the question of the *timeliness* of a motion to intervene is reviewed for abuse of discretion. (*McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1393-1394 (9th Cir. 1992).) The arguments raised by the racing associations concerning the District Court's error in denying the intervention motion establish that the trial court abused its discretion in issuing the denial, but the actual standard of review was not acknowledged in that brief. The racing associations regret any inconvenience to the court in failing to specifically note this additional standard and seek to set the record straight by this further reference.

[7] *Id.* at 1394.

Notwithstanding the fact that the District Court relied solely on the first ground, the racing associations have established that no prejudice will be suffered by the other parties if the racing associations' motion to intervene is granted. In addition, the record demonstrates that the length of delay in filing the motion was both relatively short and adequately explained. Moreover, given the extreme prejudice that will be suffered by the racing associations if they are not permitted to intervene, equitable considerations clearly militate in favor of granting the motion.

As fully explained in the opening brief, the racing associations had no reason to intervene in a matter between the State of California and the tribes concerning the issue whether the State was improperly taxing the *tribes*, which was the only basis for the tribes' initial declaratory relief action against the State. The interests of the racing associations were not implicated until after remand of this Court's first opinion in this matter. The arguments raised by the tribes in their opposition to this appeal do not overcome this basic point.

For example, the tribes argue that the racing associations have known since 1990 that the tribes and the State "were litigating the question of whether the tribes or the State was entitled to the disputed license fee funds . . . " and that the racing associations should have asserted their interest at that time.[8] This argument is patently disingenuous and misleading because it rests on the generality of the allegation. It is the *specific* dispute now at

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[8] Tribes' Brief, p. 12.

issue – whether the State of California has agreed, or can be compelled, to tax the racing associations for the benefit of the tribes – and not the mere existence of *any* dispute between the tribes and the State that determines when and if the racing associations had the requisite legal interest to support intervention.

The tribes also argue that paragraph 5(b) of the operating agreements between SCOTWINC, acting as agent for the racing associations, and the tribes is evidence that the racing associations were aware of the dispute between the tribes and the State and could have protected themselves in such agreements as to any claim they might have to the monies in dispute. This argument is also without merit and ignores the fact that, when the operating agreements were signed, the only dispute between the State and the tribes was the dispute over the lawfulness of the tax which the tribes claimed was imposed on them.[9]

As the State demonstrated in its opening brief, the question posed by the original declaratory relief actions filed in 1990, and decided by this court in the first appeal in this matter, was whether the State was improperly taxing the *tribes*.[10] The racing associations therefore had no direct interest at stake in the litigation, and had no reason to intervene. That dispute, which was resolved by

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[9] As noted in the declaration of Cathy Christian attached to the Emergency Motion for Stay filed by the racing associations with this Court on July 30, 1996, the last operating agreement between SCOTWINC and the tribes expired at the end of 1994. Since that date, no operating agreement has been signed.

[10] State Brief, pp. 23-24.

this Court in its first opinion, is the only dispute which the racing associations acknowledged in their operating agreements.

Indeed, the terms of the compacts themselves belie the tribes' assertions. The racing associations were aware that a determination of the *lawfulness* of the tax must precede any determination of *distribution* of that tax. This is manifested by the fact that the terms of the compacts, set forth in Paragraph 19(b), require a finding whether the state tax was impermissible *prior* to determination of whether the tax should either be retained by the State (paragraph 19(b)(2)) or refunded to the tribes (paragraph 19(b)(3)).[11] Thus, it is simply not true that the operating agreements demonstrate that the racing associations were aware of the possible effect of this litigation on their interests.[12]

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[11] See, Clerk's Record ("CR") 74: p. 3, n.1.

[12] The tribes ask this Court to take judicial notice of the operating agreement between the Sycuan Band of Mission Indians and the State which expired in 1991. (Tribes' Brief, pp. 16-17.) Although the racing associations acknowledge the existence of a now-expired agreement, they vigorously contest the legal significance of that agreement with respect to the timeliness of the motion to intervene. (See, e.g., Declaration of Cathy Christian attached to the racing associations' Motion for Emergency Stay filed with this Court on July 30, 1996.) Rule 201 of the Federal Rules of Evidence permit this Court to take judicial notice of appropriate facts, but permits an objecting party an opportunity to be heard prior to such action. The appellant racing associations request an opportunity to object to judicial notice of the 1991 operating agreement for the purpose of establishing notice as of that date of the need to protect their interests in this litigation.

Arguably, the interests of the racing associations arose when this Court held that the license fee, *while not a tax on the tribes*, was nonetheless preempted. This Court reasoned that the imposition of the license fee *on the racing associations* was preempted by federal law. The conflict between the State's collection of a license fee from the racing associations and federal law was identified in the first opinion as an interference with the "primary beneficiary" requirement of IGRA[13] that tribes receive the greatest monetary benefit from gambling on their lands. Although technically unnecessary to the holding, this Court further held that the state tax imposed a "burden" on the tribes because of a "right" they acquired by virtue of those procedural provisions of the compact which refunded the license fee to the tribes if they prevailed in the litigation.[14] Thus, this Court decided the matter on substantively different grounds than those raised by the tribes and addressed by the District Court and briefed by the State and the tribes and, for the first time raised the possibility that the compact would be interpreted as an agreement to tax the *racing associations* but give the tax proceeds to the tribes.

While the tribes argue that the racing associations should have sought intervention at the time that this Court's earlier decision was rendered, the most charitable characterization of that assertion that can be made is that it is offered tongue in cheek. Certainly the tribes have

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[13] Indian Gaming Regulatory Act, 25 U.S.C. section 2701, et seq.

[14] *Cabazon Band of Mission Indians v. Wilson, et al.*, 37 F.3d 430, 433-435 (9th Cir. 1994.)

cited no case authority where intervention was permitted by the Court of Appeals after issuance of a decision and prior to the issuance of a remittitur. Moreover, it is arguable that the result of this Court's holding on remand would be that because the State could no longer impose its (now lawful) license fee on the racing associations, the tax simply would not be paid to the State.

The real issue in this appeal is whether the racing associations should have sought intervention at the moment the tribes filed amended complaints and the State argued that, under the theory of recovery in those complaints, the racing associations must be named as indispensable parties. Certainly the racing associations could reasonably believe that the State was advancing their interests at that point in this litigation. Moreover, the reasons for the delay in seeking intervention are eminently reasonable: a thorough review of the options open to the racing associations to best protect their statutorily-granted interest in all racing proceeds not otherwise distributed by the California Legislature in the applicable sections of the Business and Professions Code.[15] Moreover, the actual time which passed between the State's filing of its first amended answers (11/21/96; CR 98) and the racing associations' motion to intervene (7/3/96; CR 125) is not measured in years but in months: seven months.

While the tribes complain of the delay, they do not offer any argument why intervention would have prejudiced their interests or unduly delayed the proceedings

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[15] Opening Brief, p. 21.

before the trial court. The issue raised by the racing associations was, and is, solely one of law, which could have been addressed by the District Court at the same time it addressed the State's motion for reconsideration.

On the other hand, the denial of the motion to intervene is catastrophic for the racing associations. Only in this litigation is there an opportunity for the racing associations to raise their claim that, because this Court rejected the tribes' argument that they were taxed by the State, the compact does not entitle the tribes to the fee. Unless the racing associations are permitted to intervene in this case, their claim to approximately $11 million paid to the State in taxes from the proceeds of past simulcast revenues, as well as their right to future simulcast revenues, will be forfeited without an opportunity to be heard.

Finally, the State did not seek reconsideration of the District Court's rejection of the State's indispensable party affirmative defense, an act which is obviously not consistent with representing the interests of the racing associations. Moreover, one of the States' arguments concerning the continuing validity of the compacts is that its inability to tax the racing associations for the benefit of the tribes was never part of the agreement reached with the tribes.[16] As a result, the State asserts that the compact is no longer valid, at least to the extent that paragraph 19 may affect the distribution of the license fees. Thus, understandably, the State recognizes that, if the compacts remain in effect, the funds should remain with the racing

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[16] State's Brief, pp. 28-35.

industry participants, but the State has not yet surrendered its claim to the taxed monies.

In short, the interests of the racing associations are totally unrepresented in this appeal by any party. Given the significant nature of the interest claimed by the racing associations and the fact that only issues of law would be raised by their intervention, neither the tribes nor the State would be prejudiced if intervention were granted.

II. THE RACING ASSOCIATIONS HAVE A SIGNIFICANT LEGAL INTEREST IN THE UNLAWFUL TAKING OF THEIR PROPERTY IF THE COMPACT IS INTERPRETED TO REQUIRE STATE TAXATION OF SATELLITE WAGERING PROCEEDS FOR THE BENEFIT OF THE TRIBES.

The tribes also argue that, even if the racing associations have a statutorily-granted interest in the satellite wagering revenues under state law, they have no enforceable legal interest in the license fees because the "compact supersedes state law." The tribes rely on language in this Court's earlier opinion, and argue that the State agreed to modifications of state law in the compact. The tribes then argue that the State intended for the compact, rather than state law, to govern satellite wagering on Indian lands.[17] The tribes' assertion fails for three distinct reasons: (1) the tribes ignore the fact that they expressly agreed, in the compacts, that state law would govern

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[17] Tribes' Brief, pp. 21-24.

satellite wagering operations and (2) they rely on language in this Court's earlier opinion which was unnecessary to the holding in the case and which, in any event, has significance only for the limited purpose of establishing the preemptive effect of federal law over any state taxation of satellite wagering proceeds, at least to the extent that the tribe is not the "primary beneficiary"; and (3) enforcement by a federal court of a compact interpreted to require taxation of private entities such as the racing associations for the benefit of the tribes is prohibited by the Fifth and Fourteenth Amendments to the United States Constitution.

First, the tribes agreed to the extension of the State Horse Racing Law[18] on their lands to govern the operation of satellite wagering. Paragraph 16 of each of the tribal-state compacts *expressly* provides that State statutory and constitutional law governs satellite wagering operations on the tribes' lands, except to the extent modified by the compact or in conflict with federal law.[19] Thus, with respect to the distribution of satellite wagering proceeds to the *racing associations*, the tribes expressly acknowledge that state law will control. Additionally, in paragraph 19(a) of the compacts, the tribes acknowledge that the "amounts deducted from parimutuel wagers at the [tribal] simulcast wagering facility, *and the distribution of such amounts*, shall be the same as that provided for

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[18] California Business and Professions Code secs. 19400, et seq.

[19] CR 19; Cabazon and Sycuan Compacts, ¶ 16.

under state law for simulcast wagering facilities, other than fairs, in the southern zone."[20]

Moreover, even if paragraph 16's incorporation of state law is modified by *federal law*, nothing in paragraph 16 suggests that federal preemption of state taxation of the *racing associations* results in the tribes' right to those funds. Indeed, it is noteworthy that the tribes never filed suit against the racing associations to establish that the tribes were entitled to racing association revenues taxed by the State. Such a suit might have been short-lived, given the tribes' express agreement in paragraph 19(a) of the compacts to the distributions to the racing industry found in California Business and Professions Code section 19605.8.[21] Thus, the tribes cannot persuasively argue that the compact terms defeat the racing associations' legal entitlement to the taxed revenues.

Second, the tribes rely on dicta in this Court's earlier opinion to support their claim that the compact entitles them to the racing industry's revenues. With all due respect, the racing associations assert that this Court's initial opinion rests solely on the determination that IGRA precludes state taxation of the racing associations because that law requires the tribes, not the State, to be

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[20] CR 19; ¶ 19(a) of the Sycuan and Cabazon compacts (emphasis added).

[21] In 1991, the California Legislature caused a renumbering of the code sections in the Horse Racing Law. Thus, the specific statutory references found in some of the compacts which were signed prior to that date are now found in the renumbered sections.

the "primary beneficiary" of the satellite wagering operation. Although the earlier opinion finds a tribal "right" to the license fee in paragraph 19(b)(3) of the compact, the significance of that holding must be limited to the preemption analysis.

The tribes' right to *enforce* the compacts in the manner they assert is required by the compacts' terms, and any State or racing association defenses thereto, necessarily was never before this court. This is because the only issue raised by the declaratory relief action was the lawfulness of the tax, not the consequences which followed from a determination that the tax was unlawful. The significance of this Court's decision was therefore solely to invalidate the tax. The question of how racing association revenues were subsequently to be distributed, if at all, by the terms of the compact required the tribes to make a claim under the compact. Such claim was subject to the State's possible defenses, and, most importantly for the purposes of this appeal, should have required the tribes to name the racing associations as indispensable parties.[22]

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[22] In its April 26, 1996 memorandum opinion, the District Court struck the State's affirmative defenses under Rule 19(a) of the Federal Rules of Civil Procedure. The trial court struck the defense under Rule 19(a)(1) because it found that the [sic] both the tribes and the racing associations could protect their interests by collecting the state license fee from the State. (ER 13-14.) Even setting aside the legal questions raised by subjecting the State to double liability, any state law claim filed by the racing associations for the tax revenues might ultimately be defeated by the sovereign immunity of the tribes or rendered a practical impossibility by the Legislature's refusal to appropriate the necessary funds to pay the judgment. (CITE.)

An additional reason for limiting the significance of this Court's holding that "the compact supersedes state law" to the preemption analysis and declining to accept the tribes' argument that the holding represents an enforcement of the compact itself is because this Court was never asked to resolve a conflict between the compact and state law, but rather to determine, as a matter of *federal law*, whether the State's imposition of the license fee was an improper tax on the tribes. As a matter of federal law, this Court found that the fee was not an improper tax on the tribes, but rather an improper tax on the *racing associations*. Thus, until these appeals, this

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The District Court also struck the affirmative defense under Rule 19(a)(2) on the grounds that the racing associations had not claimed any interest in the litigation. (ER 14.) As explained herein, the racing associations' reluctance to affirmatively seek to join this litigation was fully explained by the State's assertion of their indispensable party status and the fact that the legal issues on remand were significantly different than those presented by the tribes' initial actions for declaratory relief. Moreover, the case authority cited by the District Court for the proposition that an indispensable party defense can be defeated by the third party's lack of interest in the litigation is inapposite. (See, *DeWit v. Firstar Corp.*, 879 F.Supp. 947, 995 (N.D. Iowa 1995) [Third parties are not "indispensable" under Rule 19(b), thus requiring dismissal for failure to join, because they are not "necessary" parties under Rule 19(a), due to third parties' express abandonment of claim to property at issue or failure to assert an interest.].) Here, as admitted by the tribes, SCOTWINC, on behalf of the racing industry participants, advised the tribes at the end of 1994 that, should the tribes claim an interest in *racing revenues* taxed by the State, they would object. (See, Exhibits B and C to Cabazon and Sycuan Bands' July 31, 1996, Memorandum in Opposition to the racing associations' motion to this Court for emergency stay.)

Court has never been asked to consider whether the State breached its compact obligations by refusing to pay revenues obtained from the racing associations to the tribes.

Finally, the racing associations note that the State has objected to the jurisdiction of the federal courts to enforce what the State characterizes as a political agreement, i.e., the negotiated tribal-state compact. Even if the compact is viewed as a statement of federal law, in that after it is negotiated it is approved by the Secretary of the Interior and published in the federal register and therefore "enforceable" the same as any Congressional enactment, as interpreted by the District Court it must be struck down as unconstitutional.

The District Court adopted the tribes' reasoning that the compact anticipated *any* basis under which State collection of the license fee might be ruled unlawful and therefore ordered the State to pay to the tribes revenue derived from taxation of the racing associations.[23] The District Court previously held that the compact was implicitly enforceable in federal court because

> " . . . IGRA expressly authorizes a compact to include remedies for breach of compact, and because IGRA's grant of jurisdiction to require good faith bargaining would be pointless were there no jurisdiction to enforce the compact . . . "[24]

Thus, the District Court based jurisdiction on its ability to enforce a Congressional enactment.

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[23] ER 17-18.

[24] CR 74: pp. 8-9.

Congress, however, has no power to enact legislation requiring state taxation of a person for any reason, much less using taxing power to deprive a person of their property for the benefit of another. Simply stated, neither IGRA itself nor a tribal-state compact negotiated thereunder can be construed to create a right in the tribes to the property of third parties. Such an interpretation would be unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution. The State simply cannot confer on the tribes, even under the compulsion of IGRA or a tribal-state compact, such a right and a federal court has no power to enforce such a taxing arrangement between a State and a tribe by construing the arrangement as inherent in a Congressional enactment such as IGRA.

At the risk of engaging in dramatic speech, the racing associations point out that similar taxation without representation was the spark that led to the American Revolution and is an anathema to our system of government. Indeed, it can be argued that the United States Constitution, in guaranteeing to the States a republican form of government, protects against the legislative efforts of the State and a tribe to the deprivation of property rights of other persons.[25]

For each of these reasons, the racing associations have established a significant legal interest in these proceedings which justifies their intervention in these proceedings.[26]

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[25] United States Constitution, Article IV, section 4.

[26] The tribes claim an additional ground for affirmance of the District Court's denial of the motion to intervene by arguing

CONCLUSION

For each of the above reasons, appellant racing associations, the proposed defendant-intervenors in this matter, request that an order be entered reversing the District Court and granting the motion to intervene. In addition, appellant racing associations urge this Court to reverse the order of the District Court requiring the State of California to pay to the tribes any funds derived from the State's taxation of racing association revenues derived from satellite wagers placed at the facilities of the plaintiff Indian tribes.

DATED: January 13, 1997

Respectfully Submitted,

Nielsen, Merksamer, Parrinello,
Mueller & Naylor, LLP

By: /s/ Cathy Christian
CATHY CHRISTIAN
Attorneys for Proposed
Defendant Intervenors/
Appellants

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that the racing associations violated Local Rule 142(e) of the Eastern District of California requiring an affidavit of counsel demonstrating a need for an order shortening time and the reason for failure to obtain a stipulation for such an order from the other parties. (Tribes' Brief, p. 24, n. 20.) The District Court did not rely on Rule 142(e); in any event, counsel for the racing associations fully complied with the rule's provisions by submitting declarations establishing that the tribes' counsel refused to stipulate to the shortened time request and that the request was based on the desire to have the racing associations' motion heard on the same date as the State's motion for reconsideration. (CR 126 [Ex Parte Application of Proposed Defendant-Intervenors for Order Shortening Time, filed 7/3/96]; 127; 129.)

CERTIFICATE OF COMPLIANCE

The accompanying reply brief of appellants and proposed intervenor-defendant racing associations was prepared using a proportionately spaced typeface (Times Roman) and was created with 14-point type. The brief is double-spaced and contains 4,542 words.

DATED: January 13, 1997

Respectfully Submitted,

Nielsen, Merksamer,
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By: /s/ Cathy Christian
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ADDENDUM

RELEVANT STATUTES

California Business and Profession Code

§ 19400. Citation of chapter

This chapter is known and may be cited as the "Horse Racing Law."

§ 19550. Number required

The board shall require each licensed racing association which conducts 14 or less weeks of racing to designate three racing days, and each licensed racing association which conducts more than 14 weeks of racing to designate five racing days during any one meeting, to be conducted as charity days by such licensee for the purpose of distribution of the net proceeds therefrom as hereinafter defined to beneficiaries through the distributing agent, as provided herein.

For the purposes of this section, a split meeting shall be considered a single meeting and shall designate the appropriate number of charity days based on the total weeks of racing allocated for both periods of the meeting.

This section shall not apply to the California Exposition and State Fair or a county or district agricultural association fair.

§ 19551. Conduct of charity day racing as condition of license

As a condition of the issuance of the license, the board shall require that the licensee of such meeting shall conduct such charity day racing and shall furnish its plant,

facilities and all personnel and property necessary for the conduct of racing on the charity days.

§ 19552. Service and compensation of racing officials

All racing officials required by law or regulation to serve in connection with the meeting shall also serve, without further authority or designation, in their respective capacities and at the same rate of compensation in connection with the charity day racing.

§ 19553. Disposition of net proceeds; What constitutes income; Deduction of expenses; Payment of balance to distributing agent; Prohibition against making profit

On such charity days the income from all operations carried on in connection with or resulting from the conduct of racing on such days, including income from parimutuel wagering, admissions, parking, program sales and concessions shall be income from operations on such charity days.

From the gross income from such operations on charity days there shall be deducted only the expenses incurred because of the conduct of racing on such days, but no deduction shall be made by the licensee for any overhead expenses or for expenses of the licensee which would be incurred irrespective of the conduct of the charity days racing.

The balance of such income after such deductions is herein designated as charity days' net proceeds and shall be paid by such licensee to a distributing agent selected

and qualified in accordance with this article. No profit shall be made, either directly or indirectly, from such charity days' operations by the licensee of the meeting.

§ 19554. Distributing agent; Qualifications; Membership; Bylaws, vacancies, and annual meeting

The distributing agent for such charity days' net proceeds shall always be a nonprofit organization or corporation, or nonprofit organizations or corporations, selected by the licensee of the meeting and approved by the board.

(a) Each such distributing agent to be qualified hereunder must conform to the then existing laws and regulations of this State and the United States, so as to be exempt or be entitled to exemption from the payment of any tax measured by income.

(b) It shall have not less than five trustees or directors. None of the individuals constituting the governing board of trustees or directors of such distributing agent shall be directly connected with, be a stockholder, or have any interest in the racing association which is the licensee of the race meeting. Each of such individual trustees or directors shall be a person who is at the time (1) a resident of this State, and (2) an executive, officer, director, trustee, or member of the governing body or board, by whatever name such governing body or board may be known, of an organization engaged in civic, religious, charitable, educational or veteran activities in this State.

(c) Each distributing agent shall adopt bylaws, shall provide for election to fill vacancies in the board of directors or trustees, and shall hold at least one meeting each year.

§ 19555. Payment to distributing agent; Distribution to beneficiaries

Each licensee shall pay over such charity days' net proceeds to such distributing agent as soon as practicable after the determination thereof, and such agent or agents shall hereafter distribute not less than 90 percent of the aggregate proceeds from charity days' racing received available for distribution by it to beneficiaries within 12 calendar months after the last day of the meeting during which such charity days were conducted. The balance, if any, of such aggregate charity days' net proceeds not distributed within such 12-month period shall be distributed as soon thereafter as is practicable.

§ 19556. Disposition of net proceeds; Qualified beneficiaries; Effect of charities in connection with race horses

The distribution shall be made by the distributing agent to beneficiaries qualified under this article. For the purposes of this article, a beneficiary shall be:

(a) A nonprofit corporation or organization entitled by law to receive a distribution made by a distributing agent.

(b) Exempt or entitled to an exemption from the same taxes measured by income imposed by this state and the United States as those under which the distributing agent is exempt or entitled to an exemption.

(c) Engaged in charitable, benevolent, civil, religious, educational, or veterans' work similar to that of agencies recognized by an organized community chest in the State

of California, except that the funds so distributed may be used by the beneficiary for capital expenditures.

(d) Approved by the board.

No beneficiary otherwise qualified under this section to receive charity day net proceeds shall be excluded on the basis that the beneficiary provides charitable benefits to persons connected with the care, training, and running of racehorses, except that type of beneficiary shall make an accounting to the board within one calendar year of the date of receipt of any distribution.

§ 19557. Approval prerequisite to payment to beneficiary

Within the 12-month period specified in Section 19555, and prior to the payment of any charity days' net proceeds to any beneficiary, the distributing agent shall submit the name of the beneficiary to the board for the board's approval.

If the board does not disapprove of the beneficiary within 60 days after the submission, its approval shall be deemed to have been given.

§ 19605.8. Distribution of remaining funds from thoroughbred meetings

For thoroughbred meetings, the funds remaining after distribution of the amounts set forth in Sections 19605.7

and 19605.71 shall be distributed 50 percent as commissions to the association which conducts the racing meeting and 50 percent as purses to the horsemen participating in the racing meeting.

Federal Civil Judicial Procedure Rules

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1930.)

PROOF OF SERVICE BY MAIL
(Code Civ. Proc. §§ 1013a, 2015.5)

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 770 L Street, Suite 800, Sacramento, California 95814.

On January 13, 1997, I served the foregoing **REPLY BRIEF** on the parties in said action by enclosing a true copy thereof in an envelope and placing the envelope for collection and mailing on the date and at the place set forth above following our ordinary business practices, addressed as follows:

PLEASE SEE ATTACHED LIST

I am readily familiar with this firm's practice for collecting and processing envelopes for mailing. On the same day that envelopes are placed for collection and mailing, they are deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 13, 1997, at Sacramento, California.

/s/ CHERYL BALDI

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IN THE UNTIED [sic] STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CABAZON BAND OF MISSION INDIANS, et al., Plaintiffs-Appellees, **vs.** **PETE WILSON, et al.** Defendants-Appellants.	Nos. 96-16432, 96-16443

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Of Petitioners Southern California Off-Track Wagering, Inc. (SCOTWINC), Del Mar Thoroughbred Club, Hollywood Park, Inc., Los Angeles Turf Club, Oak Tree Racing Association, Los Alamitos Race Course and the Los Angeles County Fair

(Proposed Defendant Intervenors)

(Filed Sep. 17, 1997)

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IN THE UNTIED [sic] STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CABAZON BAND OF MISSION INDIANS, et al., Plaintiffs-Appellees, **vs.** **PETE WILSON, et al.** Defendants-Appellants.	Nos. 96-16432, 96-16443

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Pursuant to the provisions of Rules 35 and 40 of the Federal Rules of Appellate Procedure (and Circuit Rules 35-1 and 40-1), petitioners, Southern California Off-Track Wagering, Inc. (SCOTWINC), Del Mar Thoroughbred Club, Hollywood Park, Inc., Los Angeles Turf Club, Oak Tree Racing Association, Los Alamitos Race Course and the Los Angeles County Fair, who are the proposed defendant-intervenors herein, respectfully petition the judges of this Court for a rehearing of the appeal in the above-entitled cause and respectfully suggest that this cause is appropriate for rehearing by all the judges of this Court convened en banc.

INTRODUCTION

In its second decision in this matter, this Court held that "despite its long and convoluted history, this case

begins and ends with four Tribal-State compacts." (Slip Opn., p. 11037.) In its analysis of those compacts, this Court determined that the State of California and the four Indian tribes who brought suit herein agreed to submit to the federal courts the broad question of whether the statutorily-mandated state license fee imposed *on California racetracks and horse owners*[1] for revenue generated at off-track wagering facilities on Indian lands was permissible under the Indian Gaming Regulatory Act ("IGRA").[2] As explained by both the State and the racing industry in their briefs to this Court, the question submitted to the district court was never whether the State's tax on the racing industry was unlawful *per se*, but rather whether the State was unlawfully taxing the tribes, either directly or indirectly because the tax on the racing industry economically burdened the tribes.

Under well-established principles of federal law, if a tax on a third party imposes an economic burden on an Indian tribe, the tax will be struck down. The result is that the third party *no longer will be taxed*, thus avoiding passing the burden of the tax on to the tribe.[3]

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[1] Petitioners will be interchangeably referenced herein as either the "racing industry", "racing industry participants" or "racetracks and horse owners". This is a more comprehensive and accurate description of the various petitioners than merely "racing associations" which was used previously.

[2] 25 U.S.C. section 2701, et seq. The state license fee against the revenues of the racetracks and horsemen is imposed pursuant to California Business and Professions Code sections 19605.7 and 19605.71.

[3] In *Crow Tribe of Indians, et al. v. State of Montana*, 92 F.2d 826 (9th Cir. 1996), this Court noted that taxes collected from a

This explains why the racing industry participants did not seek to intervene in this litigation. It was not until this matter was remanded, and the district court held, for the first time, that the *compacts* required continued taxation of the racing industry for the benefit of the Indian tribes that the racing industry's interests were directly impacted. Nonetheless, this Court determined that direct taxation of the racing industry was always the dispute submitted to the court by the parties and faulted the racetracks and horse owners for failing to assert their interest sooner.

Moreover, this Court's various opinions, each different from the other, but all finding a rationale to give the tax revenues to the tribes, fail to even acknowledge the most simple and logical explanation for the language in Paragraph 19(b) of the Compacts which provides for distribution of the tax in the event it is found unlawful. That explanation is: the State never agreed to continue imposing an unlawful tax on the racing industry for the benefit

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third party (and held in a court registry) were returned to the tribe because of an earlier decision which held that the tribe *suffered an actual economic burden* in that the value of the tribe's coal leases was reduced by the amount of Montana's severance tax. Such is manifestly not the case here, where no court has found that the tribes have been economically burdened by the tax. Rather, this Court has found that California *agreed* to tax the racing industry for the benefit of the tribes. Because, as explained herein, California has no authority to tax the racing industry for this purpose, the result of finding that the tax was invalid should be to simply return the tax money to the racing participants and to cease collecting it. There is no basis for this Court's unprecedented decision granting the tribes an unearned windfall based on the earnings of racetracks and horse owners.

of the tribes. Rather, assuming the tax was determined to be an unlawful tax on the tribes, the State and the tribes merely devised a *mechanism* for refunding those funds.

A perusal of the California Horse Racing Law[4] establishes that all the money wagered at an Indian facility (or *any* off track facility) is never handled by the tribe, but rather is collected and *distributed* by the race tracks.[5] Thus, if the tax was an unlawful burden on the tribe, the only practical way to return it was to get it back from the racing associations so that it could be refunded to the tribe. That is the *sole* interpretation of Paragraph 19(b) which explains the actions of the parties. The interpretation given by the Court, viz., that the State agreed to continue collecting an unlawful tax on the racing industry, produces strained and incredible results.

Even granting, for the sake of argument, that the State agreed to tax racetracks and horse owners and turn over those tax revenues to the tribes, and further assuming that petitioners might have expressed their interest in this litigation at an earlier date, the racing industry asserts that it is a clear abuse of discretion to deny intervention where, as here, the Court's interpretation of the State's agreement with the Indian tribes unconstitutionally deprives the racing industry of their property.

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[4] California Business and Professions Code Section 19400, et seq.

[5] See, e.g. California Business and Professions Code Sections 19605.3 (all off track wagers must be combined with on track parimutuel pool); 19606.1 (the racetracks must deposit all license fees into a special account in the State's General Fund.)

I. THIS COURT MISTAKENLY DETERMINED THAT THE RACING INDUSTRY SHOULD HAVE INTERVENED EARLIER IN THIS MATTER BECAUSE TAXATION OF THEIR REVENUES FOR THE BENEFIT OF INDIAN TRIBES WAS ALWAYS THE QUESTION TO BE DETERMINED IN THIS LITIGATION.

In its most recent decision in this matter, this Court held that "[f]rom the inception of this litigation, it was clear that the license fees at issue in this case are paid by the racing associations."[6] As a result, this Court held that the racing industry's intervention motion, which was not filed until the district court, on remand, ordered the fees paid to the Indian tribes, was untimely. The petitioning racetracks and horse owners respectfully assert, however, that neither the district court's first decision, nor this Court's earlier opinion (labeled in the slip opinion herein as "Cabazon II") support this view.

In the district court's first opinion,[7] the court noted that:

> "While negotiating the compacts, the parties disagreed about whether California has jurisdiction to collect its license fee based on revenues generated at the Tribes' simulcast operations. As noted above, such fees are collected by law from the racing associations, based on wagering revenues – including simulcast wagers – generated by the associations' races. (Citations omitted.) . . . *The Tribes argue that the license fees are impermissible because they reduce the amount that*

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[6] Slip Opinion, p. 11053.

[7] *Cabazon Band of Mission Indians, et al. v. State of California*, 788 F.Supp. 1513 (1992).

> *the Tribes would collect from the simulcast enterprise, and so constitute a direct tax.* (Footnote omitted.) California asserts that because the license fees are paid by the racing associations, the racing associations are the entities burdened by the tax, not the Tribes. The Tribes and California agreed that the Tribes would seek judicial resolution of this question, which is the sole issue before this Court." (Emphasis added.)[8]

Obviously, the question considered by the district court (because it was the question submitted by the parties) was whether the fees were an impermissible tax *on the tribes*. Indeed, the Indian tribes submitted declarations purporting to establish that the state license fee was a tax on the tribes.[9] The district court rejected the assertion that the state license fee was a direct tax on the tribes and further considered the contention that the tax was an impermissible indirect tax on the tribes, framing the question as follows:

> "The dispute in the present case is over whether the license fees, which are levied on the racing associations and which affect the Tribes only indirectly, *are an impermissible burden on the Tribes.*" (Emphasis added.)[10]

The district court then held that neither IGRA nor general principles of federal Indian law, which consider the scope of tribal sovereignty, preclude state taxation of

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[8] *Id.* at p. 1516.

[9] See Declaration of John James, filed with the Cabazon tribe's Motion for Summary Judgment.

[10] *Cabazon Band of Mission Indians, et al. v. State of California*, 788 F.Supp. 1513, 1516, *supra*.

the racing industry as an indirect tax on the tribes. The district court found that the tax imposed no economic burden on the tribes and rejected as "circular" the tribes' suggestion that the tribal-state compact, which provides that *if the tax is found unlawful*, the tax will be refunded, was itself an economic burden constituting an unlawful tax.[11]

Thus, given that the State and the tribes were only litigating the question of whether the tax imposed a burden on the *tribes*, and that the district court concluded that no such burden existed, it cannot be said that the racing industry was remiss in not moving to intervene.

This Court's decision in *Cabazon II*[12] similarly does not establish the need for immediate intervention by the racing industry. At best, it can be said that this Court's earlier decision found that the tribal-state compacts constitute an economic burden on the tribes because they establish a tribal "right" to those tax revenues which are in excess of the amount earned by the tribe. *Cabazon II's* preemption analysis rested on the theory that the State could not earn *more* than an Indian tribe for gambling activity on Indian lands because the tribe would not be the "primary beneficiary" of the activity. Thus, although the tribes and the State might have re-negotiated their compact so that the State did not earn more than the tribes, nothing in *Cabazon II* suggested that the tax on the racing industry for wagers placed on tribal lands should be turned over to the tribes.

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[11] *Id.*, at pp. 1517.

[12] *Cabazon Band of Mission Indians, et al. v. Wilson*, 37 F.3d 430 (9th Cir. 1994).

On remand, moreover, the State of California argued that *Cabazon II* resulted in voiding the compacts, because others benefitted more from the conduct of off-track betting on Indian lands than did the tribes. Although the racing industry might have moved to intervene at the initial stages of the remand, it was not until the tribes filed amended complaints and the State argued that the racing industry was an indispensable party that it can be stated with any certainty that the racing industry was on notice that its interests were endangered. However, the actual time which passed between the State's filing of its first amended answers (11/21/96; Clerk's Record 98) and the racing industry's motion to intervene (7/3/96; Clerk's Record 125) was a mere seven months. As explained below, given the constitutional dimension of this Court's holding that the State and the Indian tribes *agreed* to deprive the racing industry of a portion of its revenue, solely to benefit the tribes, the delay – in a case which had already spanned five years – should not be fatal. Nor have the State or the tribes established *any* prejudice as a result of the racing industry's intervention in this matter.

II. EVEN IF THE STATE AND THE INDIAN TRIBES AGREED TO TAX THE RACING ASSOCIATIONS FOR THE BENEFIT OF THE TRIBES, SUCH AN AGREEMENT IS [sic] SERVES NO PUBLIC PURPOSE. ACCORDINGLY, THE COURT SHOULD HAVE PERMITTED THE RACING INDUSTRY PARTICIPANTS TO INTERVENE AND ASSERT THEIR CONSTITUTIONAL RIGHTS.

This Court's most recent decision in this case does not even consider the constitutional arguments raised by

the holding that the State must tax racing industry revenues and turn those tax proceeds over to the tribes.[13] To the contrary, in a footnote to the decision, it is stated that the racing industry's interest is "questionable" because the racing participants can "pursue any grievance they may have against the State in a separate action if they so choose."[14] The opinion does not discuss how the racing industry might avoid state immunity to any claim for money damages filed in federal court; furthermore, any claim asserted in state court might be subject to legislative appropriation.[15]

The racing industry respectfully asserts that their constitutional interest in revenues generated by their commercial activities cannot be so easily dismissed.

The State's taxing authority is of course subject to the due process guarantees of the United States Constitution. Furthermore, it is a fundamental tenet of tax law that the taxing power exerted by a state must serve a public purpose.[16] Although the public purpose for which the

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[13] The district court's July 19, 1996 order required that "[w]ithin 14 days of this order the State shall pay over to the tribes *the monies that have been assessed as a license fee on parimutuel offtrack wagering at the plaintiffs' simulcast facilities.*" (Excerpt of Record, p. 36; emphasis added.)

[14] Slip Opn. at p. 11053, n. 3.

[15] See, e.g., *Calif. State Employees Assn. v. Flournoy*, 32 Cal.App.3d 219 (1973).

[16] "Inasmuch as public moneys cannot be expended for other than public purposes, it follows that an exercise of the taxing power for merely private purposes is beyond the authority of government." *Analysis and Interpretation of the Constitution of the United States of America*, Congressional Research Service, Library of Congress (1987).

State may collect taxes may be broad, in this case *no* public purpose has ever been identified with respect to the state's "agreement" to tax the racing associations for the benefit of the Indian tribes.

This Court has never addressed the many anomalies which this case presents. The intervention of the racing industry clearly brings some of these difficulties into question. For example, this Court has never attempted to explain how a tax on the racing associations which is invalid as a matter of federal law (as held in *Cabazon II*) must nonetheless continue to be imposed and collected by the State on racing industry revenues and then paid to the tribes. In arguing that such an agreement was never made, the State has pointed out that the California Constitution forbids any branch of government from surrendering the power to tax by grant or contract[17]. Nonetheless, this Court has held that the tribal-state compact represents such a voluntary surrender; viz., an agreement to tax the racing associations and remit those taxes to the Indian tribes.

Given the unprecedented nature of this decision, the petitioning racetracks and horse owners respectfully contend that the Court erred in refusing to permit the racing industry the opportunity to be heard in this matter. As noted in the most recent decision, the test applied to intervention motions is to be interpreted broadly in favor of intervention.[18] Although an appellate court reviews

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[17] California Constitution, Article XIII, section 31. Brief of the State of California, pp. 26-27 and 34-35.

[18] Slip Opinion, p. 11052.

the denial of a motion for intervention on timeliness grounds for abuse of discretion, even in cases where a motion is filed *after judgment*, "the general rule is that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal."[19]

This Court held that the racing industry should have intervened sooner because, since the inception of this litigation, it was clear that the racing industry paid the disputed tax. Moreover, this Court held that the compacts clearly contemplated that the State would continue to collect the tax from the racing associations, regardless of whether the court found them permissible.

The petitioning racing industry participants recognize that this Court has held that the issue in this case was always whether the state tax was impermissible for any purpose. However, the fact that the industry did not seek to intervene at an earlier stage in this proceeding is only explained by the fact that, contrary to this Court's opinion, it was *not* clear that the racetracks paid the state tax until the district court and this Court's first opinion so held. Up to that point, the tribes were arguing that they paid the tax. Thus, the issue was solely between the State and the tribes: was the state lawfully taxing the racing industry (in which case taxation would continue) or was it unlawfully taxing the tribes (in which case the tax would be refunded)? This was not an issue meriting intervention by the racetracks. On the other hand, the District Court's second ruling – that the compact required

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[19] *United States v. McGough, et al.*, 967 F.2d 1391, 1394 (9th Cir. 1992)

the State to impose an unlawful tax on the racing industry and pay those funds to the tribes – clearly implicated the rights of race tracks and horse owners.

In sum, it was not clear that the compacts contemplated that the State would continue taxing the racetracks whether or not the tax was impermissible[20] (indeed, such a holding defies logic: how can the State continue a tax that has been declared unlawful?). Rather, both the State and the racing industry held the view that the compacts required a *refund* of the tax to the tribes if the tax was determined to be an unlawful assessment on Indian assets. Placed in this context, the actions of the racing industry in declining to move for intervention until the district court held that the compacts required the State to tax the racing industry and pay those monies to the tribes is eminently reasonable and intervention should have been permitted.

CONCLUSION

For each of the foregoing reasons, petitioners request that a that a [sic] rehearing of the appeal in the above-entitled cause be granted and the above-entitled cause be heard by the court en banc.

DATED: September 16, 1997

Respectfully Submitted,
Nielsen, Merksamer,
Parrinello, Mueller, &
Naylor, LLP

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[20] Slip Opinion, p. 11053.

BY: /s/ Cathy A. Christian
CATHY A. CHRISTIAN
Attorneys for Petitioners/
Proposed Defendant
Intervenors

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I, CATHY A. CHRISTIAN, certify that the Petition for Rehearing and Suggestion for Rehearing En Banc is double-spaced, proportionately spaced, with a typeface of 14 points, and contains 3,050 words.

DATED: September 16, 1997

Respectfully Submitted,
Nielsen, Merksamer,
Parrinello, Mueller, &
Naylor, LLP

BY: /s/ Cathy Christian
CATHY A. CHRISTIAN
Attorneys for Petitioners/
Proposed Defendant
Intervenors

ADDENDUM

RELEVANT STATUTES

California Business and Profession Code

19605.3. (a) An organization described in Section 19608.2 has executed an agreement approved by the board with the association conducting a racing meeting and the satellite wagering facility. The agreement shall provide, among other things, for all of the following:

(1) The conditions for transmission of the signal.

(2) That the wagers made at the satellite wagering facility will be included in the appropriate conventional or exotic pool at the racetrack where the racing meeting is conducted.

(3) The agreement of the parties, if any, respecting the payment of fees or charges by one party to the other in substitution of, or in addition or supplemental to, the distributions of the amount deducted pursuant to the first paragraph of either Section 19605.7 or Section 19605.71. The agreement as to the payment of those fees or charges shall not operate to increase or reduce the amounts otherwise payable from the amount handled pursuant to this article, other than to a party to the agreement. Any dispute relating to the amount of fees or charges to be paid by any party as a condition of receiving the live audiovisual signal from an association or fair may be appealed to the board. However, nothing in this paragraph shall be construed to require an association or fair to execute an agreement.

(b) The accommodations and equipment used in conducting wagering at the satellite wagering facility and their location have been approved by the board.

(c) The method used by the satellite wagering facility to transmit wagers, odds, results, and other data related to wagering has been approved by the board.

(d)(1) Any association or fair that operates a satellite wagering facility shall conduct wagering on all racing that is offered to the satellite wagering facility, except as otherwise provided in Section 19607.5 with respect to the northern zone, as long as the satellite wagering facility is not sustaining a loss on either a day meeting or night meeting, as determined by the board, and, if sustaining a loss on either a day meeting or night meeting, as long as the satellite wagering facility is reimbursed for that loss by either an organization described in Section 19608.2 or an association. Any association that operates a satellite wagering facility may, but is not required to, accept an audiovisual signal. Notwithstanding any other provision of this paragraph, an association that conducts a racing meeting and a fair that operates a satellite wagering facility may agree to provide an audiovisual signal and to accept wagering on less than all of the races. Acceptance of the audiovisual signal may be on such terms and conditions, including the payment of fees and charges, subject to paragraph (3) of subdivision (a), as the parties may mutually agree.

(2) In calculating the loss, if any, for operating a satellite wagering facility for a night meeting, only the expenses incurred by the satellite wagering facility because of the acceptance of night wagers shall be considered, and no overhead expenses or expenses of the satellite wagering facility which would be incurred regardless of the acceptance of night wagers shall be considered.

(e) Notwithstanding any other law or any agreement under subdivision (a), for purposes of determining license fees and breakage at the racetrack where the racing meeting is conducted, wagers at a satellite wagering facility shall not be included in the conventional or exotic pools of the association conducting the racing meeting.

(f) The horsemen's organization that represents the horsemen at the association that conducts the racing meeting on which wagers are accepted consents to the acceptance of wagers at the satellite wagering facility, except that the association or fair operating the satellite wagering facility may appeal the withholding of consent to the board that may determine that consent is not required.

19605.7. The total percentage deducted from wagers at satellite wagering facilities in the northern zone shall be the same as the deductions for wagers at the racetrack where the racing meeting is being conducted and shall be distributed as set forth in this section. Amounts deducted under this section shall be distributed as follows:

(a) For thoroughbred meetings, 2.5 percent of the amount handled by the satellite wagering facility on conventional wagers and 4 percent on exotic wagers shall be distributed to the racing association for payment to the state as a license fee, 2 percent retained by the satellite wagering facility as a commission for the right to do business, as a franchise, and such commission is not for the use of any real property, 2.5 percent or the amount of actual operating expenses, as determined by the board, whichever is less, distributed to a organization described

in Section 19608.2, and four-tenths of 1 percent deposited with the official registering agency pursuant to subdivision (a) of Section 19617.2 and shall thereafter be distributed in accordance with subdivisions (b), (c), and (d) of Section 19617.2, and thirty-three hundredths of one-tenth of 1 percent distributed to the California Center for Equine Health and Performance and sixty-seven hundredths of one-tenth of 1 percent distributed to the California Veterinary Diagnostic Laboratory System, School of Veterinary Medicine, University of California at Davis. It is the intent of the Legislature that the thirty-three hundredths of one-tenth of 1 percent of funds distributed to the California Center for Equine Health and Performance shall supplement, and not supplant, other funding sources.

(b) For harness, quarter horse, Appaloosa, Arabian, or mixed breed meetings, 1 percent of the amount handled by the satellite wagering facility on conventional wagers and 1 percent on exotic wagers shall be distributed to the racing association for payment to the state as a license fee, for fair meetings, 1.5 percent of the amount handled by the satellite wagering facility on conventional wagers and 3 percent on exotic wagers shall be distributed to the racing association for payment to the state as a license fee, 2 percent retained by the satellite wagering facility as a commission for the right to do business, as a franchise, and such commission is not for the use of any real property, and 6 percent of the amount handled by the satellite wagering facility or the amount of actual operating expenses, as determined by the board, whichever is less, distributed to an organization described in Section 19608.2. In addition, in the case of quarter horses, four-

tenths of 1 percent shall be deposited with the official registering agency pursuant to subdivision (b) of Section 19617.7 and shall thereafter be distributed in accordance with subdivisions (c), (d), and (e) of Section 19617.7; in the case of Appaloosas, four-tenths of 1 percent shall be deposited with the official registering agency pursuant to subdivision (b) of Section 19617.9 and shall thereafter be distributed in accordance with subdivisions (c), (d), and (e) of Section 19617.9; in the case of Arabians, four-tenths of 1 percent shall be distributed as breeders' awards to breeders of Arabians; in the case of standardbreds, four-tenths of 1 percent shall be distributed for the California Standardbred Sires Stakes Program pursuant to Section 19619; in the case of thoroughbreds,four-tenths of 1 percent shall be deposited with the official registering agency pursuant to subdivision (a) of Section 19617.2 and shall thereafter be distributed in accordance with subdivisions (b), (c), and (d) of Section 19617.2; and thirty-three hundredths of one-tenth of 1 percent shall be distributed to the California Center for Equine Health and Performance and sixty-seven hundredths of one-tenth of 1 percent distributed to the California Veterinary Diagnostic Laboratory System, School of Veterinary Medicine, University of California at Davis. It is the intent of the Legislature that the thirty-three hundredths of one-tenth of 1 percent of funds distributed to the California Center for Equine Health and Performance shall supplement, and not supplant, other funding sources.

(c) In addition to the distributions specified in subdivision (a) and (b), for thoroughbred and fair meetings only, six-tenths of 1 percent of the total amount handled by each satellite wagering facility authorized pursuant to

Section 19605.1 and one-half of 1 percent of the total amount handled at each other satellite wagering facility shall be allocated to the facility for promotion of that meeting's program. For mixed breed meetings, 1 percent of the total amount handled by each satellite wagering facility shall be distributed to an organization described in Section 19608.2 for promotion of the program at satellite wagering facilities. For quarter horse meetings and harness meetings, one-half of 1 percent of the total amount handled by each satellite wagering facility shall be distributed to an organization described in Section 19608.2 for the promotion of the program at satellite wagering facilities, and one-half of 1 percent of the total amount handled by each satellite wagering facility shall be distributed according to a written agreement for each race meeting between the licensed racing association and the organization representing the horsemen participating in the meeting.

(d) In addition to the distributions specified in subdivisions (a),(b), and (c), for thoroughbred meetings, four-tenths of 1 percent of the total amount handled at each satellite wagering facility authorized pursuant to Section 19605.1 and one-half of 1 percent of the total amount handled at each other satellite wagering facility shall be allocated to the association conducting the racing program to reimburse it for any costs of offsite stabling and vanning that are required pursuant to Section 19535. The amount of the reimbursement payable to an association for offsite stabling shall not exceed the actual cost to the association of maintaining stalls at its racetrack plus the actual costs incurred by the association to provide

vanning and transportation of racehorses from offsite stabling facilities to its racetrack.

(e) In addition to the distributions specified in subdivisions (a), (b), and (c), for fair meetings, four-tenths of 1 percent of the total amount handled at each satellite wagering facility authorized pursuant to Section 19605.1 and one-half of 1 percent of the total amount handled at each other satellite wagering facility shall be allocated to the organization representing racing fairs to reimburse fairs for the actual cost of providing offsite stabling and vanning required by the board pursuant to Section 19535. If fairs contract with associations to provide offsite stabling during fair meetings, the cost incurred by fairs shall not exceed the actual cost to the association of maintaining the stalls or the amount of reimbursement funds made available pursuant to this subdivision, whichever is less. In the event of a disagreement between an association and the organization representing racing fairs or the organization representing the majority of horsemen participating at the meeting with respect to the actual cost of maintaining stalls, the board, at the request of the association or the organization representing racing fairs or the organization representing the majority of horsemen participating at the meeting, shall determine within 60 days the amount of actual costs incurred. For purposes of this subdivision, "actual cost" does not include fixed overhead or administrative expenses that would be incurred by the association in the absence of an agreement to provide offsite stabling during fair meetings.

(f) Any of the promotional funds distributed pursuant to subdivision (c) that are not expended in the year in which they are collected may be expended in the

following year. If promotion funds expended in any year exceed the amount collected for that year, the funds expended in the following year shall be reduced by the excess amount.

(g) Any of the stabling and vanning reimbursement funds distributed pursuant to subdivision (d) that are not expended during the meeting at which they are collected shall be allocated to the organization representing racing fairs for additional payments to the racing association to offset its costs of maintaining the stalls contracted for by fairs pursuant to subdivision (e).

(h) Additionally, for thoroughbred, harness, quarter horse, mixed breed, and fair meetings, thirty-three hundredths of 1 percent of the total amount handled by each satellite wagering facility shall be paid to the city or county in which the satellite wagering facility is located pursuant to Section 19610.3 or 19610.4.

(i) Notwithstanding any other provision of law, a racing association is responsible for the payment of the state license fee as required by this section.

19605.71. The total percentage deducted from wagers at satellite wagering facilities in the central and southern zone shall be the same as the percentage deducted from wagers at the racetrack where the racing meeting is being conduced and shall be distributed as set forth in this section. Amounts deducted by a satellite wagering facility under this section shall be distributed as follows:

(a) For thoroughbred meetings, 2.5 percent of the amount handled by the satellite wagering facility on conventional wagers and 4 percent on exotic wagers shall be distributed to the racing association for payment to the state as a license fee, 2 percent retained by the satellite wagering facility as a commission for the right to do business, as a franchise, and such commission is not for the use of any real property, 2.5 percent or the amount of actual operating expenses, as determined by the board, whichever is less, distributed to an organization described in Section 19608.2, and four-tenths of 1 percent deposited with the official registering agency pursuant to subdivision (a) of Section 19617.2 and shall thereafter be distributed in accordance with subdivisions (b), (c), and (d) of Section 19617.2, and thirty-three hundredths of one-tenth of 1 percent distributed to the California Center for Equine Health and Performance and sixty-seven hundredths of one-tenth of 1 percent distributed to the California Veterinary Diagnostic Laboratory System, School of Veterinary Medicine, University of California at Davis. It is the intent of the Legislature that the thirty-three hundredths of one-tenth of 1 percent of funds distributed to the California Center for Equine Health and Performance shall supplement, and not supplant, other funding sources.

(b) For harness, quarter horse, Appaloosa, Arabian, or mixed breed meetings, 1 percent of the amount handled by the satellite wagering facility on conventional wagers and 1 percent on exotic wagers shall be distributed to the racing association for payment to the state as a license fee, for fair meetings, 1.5 percent of the amount handled by the satellite wagering facility on conventional

wagers and 3 percent on exotic wagers shall be distributed to the racing association for payment to the state as a license fee, 2 percent retained by the satellite wagering facility as a commission for the right to do business, as a franchise, and each commission is not for the use of any real property, and 6 percent of the amount handled by the satellite wagering facility or the amount of actual operating expenses, as determined by the board, whichever is less, distributed to an organization described in Section 19608.2. In addition, in the case of quarter horses, four-tenths of 1 percent shall be distributed as breeders' awards to breeders of quarter horses pursuant to Section 19617.6; in the case of Appaloosas, four-tenths of 1 percent shall be deposited with the official registering agency pursuant to subdivision (b) of Section 19617.9 and shall thereafter be distributed in accordance with subdivisions (c), (d), and (e) of Section 19617.9; in the case of Arabians, four-tenths of 1 percent shall be held by the association to be deposited with the official registering agency, pursuant to Section 19617.8, and thereafter shall be distributed in accordance with Section 19617.8; in the case of standardbreds, four-tenths of 1 percent shall be distributed for the California Standardbred Sires Stakes Program pursuant to Section 19619; in the case of thoroughbreds, four-tenths of 1 percent shall be deposited with the official registering agency pursuant to subdivision (a) of Section 19617.2 and shall thereafter be distributed in accordance with subdivisions (b), (c), and (d) of Section 19617.2; and thirty-three hundredths of one-tenth of 1 percent shall be distributed to the California Center

for Equine Health and Performance and sixty-seven hundredths of one-tenth of 1 percent distributed to the California Veterinary Diagnostic Laboratory System, School of Veterinary Medicine, University of California at Davis. It is the intent of he Legislature that the thirty-three hundredths of one-tenth of 1 percent of funds distributed to the California Center for Equine Health and Performance shall supplement, and not supplant, other funding sources.

(c) In addition, for thoroughbred meetings and harness, Appaloosa, mixed breed, or fair meetings, 1 percent shall be distributed to an organization described in Section 19608.2 for promotion of the program at satellite wagering facilities. Notwithstanding any other provision of law, on wagers made in the Counties of Orange and Los Angeles on thoroughbred races conduced in the County of Orange or Los Angeles, or both, excluding the 50th District Agricultural Association, the amount deducted for promotion of the satellite wagering program at satellite wagering facilities shall be one-half of 1 percent. Any of the promotion funds that are not distributed in the year in which they are collected may be distributed in the following year. If promotion funds distributed in any year exceed the amount collected for that year, the funds distributed in the following year shall be reduced by the excess amount. For quarter horse meetings, one-half of 1 percent of the total amount handled by each satellite wagering facility shall be distributed to an organization described in Section 19608.2 for the promotion of the program at satellite wagering facilities, and one-half of 1 percent of the total amount handled by each satellite

wagering facility shall be distributed according to a written agreement for each race meeting between the licensed racing association and the organization representing the horsemen participating in the meeting. To the extent that funds representing a percentage greater than one-half of 1 percent of funds wagered on thoroughbred races conducted in the Counties of Orange and Los Angeles have been distributed, prior to July 27, 1992, to an organization described in Section 19608.2 for promotion activities, but remain unused, those funds shall be redistributed, 50 percent as commissions to the association that conducts the racing meeting, and 50 percent as purses to the horsemen participating in the racing meeting. Additionally, thirty-three hundredths of 1 percent of the total amount handled by the satellite wagering facility shall be paid to the city or county in which the satellite wagering facility is located pursuant to Section 19610.3 or 19610.4.

(d) Notwithstanding any other provision of law, a racing association is responsible for the payment of the state license fee as required by this section.

19606.1. (a) Except as otherwise provided in Section 19606.3, all revenues distributed to the state as license fees from satellite wagering facilities shall be deposited in a separate account in the fund and, notwithstanding Section 13340 of the Government Code, are continuously appropriated from that account to the Department of Food and Agriculture, for allocation by the Secretary of Food and Agriculture, at his or her discretion, for the purposes set forth in paragraphs (1) to (6), inclusive. The concurrence of the Director of Finance shall be required for allocations pursuant to paragraphs (1) and (2). Allocations pursuant to paragraphs (3) to (6),

inclusive, shall be made with the concurrence of the Joint Committee on Fairs Allocation and Classification.

(1) For the repayment of the principal of, interest on, and costs of issuance of, and as security, including any coverage factor, pledged to the payment of, bonds issued or to be issued by a joint powers agency or other debt service or expense, including repayment of any advances made or security required by any provider of credit enhancement or liquidity for those bonds or other indebtedness or expenses of maintaining that credit enhancement or liquidity, incurred for the purpose of constructing or acquiring improvements at a fair's racetrack inclosure, satellite wagering facilities at fairs, health and safety repair projects, or handicapped access compliance projects at fairs or for the purpose of refunding bonds or other indebtedness incurred for those purposes. As used in this paragraph, "coverage factor" means revenues in excess of the amount necessary to pay debt service on the bonds or other indebtedness, up to an amount equal to 100 percent more than the amount of that debt service, which a joint powers agency, pursuant to the resolution or indenture under which the bonds or other indebtedness are or will be issued, pledges as additional security for the payment of that debt service or is required to have or maintain as a condition to the issuance of additional bonds or other indebtedness. Notwithstanding any other provision of law, the department may also commit any funds available for allocation under Article 10 (commencing with Section 19620) to complete projects funded under this paragraph in the priority described in this paragraph.

(2) For payment to the State Race Track Leasing Commission to be pledged for the repayment of debt necessary to construct a racetrack grandstand at the 22nd District Agricultural Association fairgrounds. This payment shall be made only if the Secretary of Food and Agriculture determines, annually, that all other pledged revenues have been applied to the repayment of that debt and have been determined by the secretary to be inadequate for that purpose.

(3) For the payment of expenses incurred in establishing and operating satellite wagering facilities at fairs.

(4) For the support of an equipment and operating fund to produce and display a consolidated California signal at satellite wagering facilities and fairs.

(5) For health and safety repair projects at fairs, which includes fire and life safety improvement projects, California Code of Regulations compliance projects, and long-term deferred maintenance projects.

(6) For the development and payment of revenue generating projects, the establishment of pilot projects to restructure the current fair system, and for projects realizing a cost savings for more efficient utilization of existing fair resources.

(b) The Secretary of Food and Agriculture may not make an allocation for purposes of paragraphs (2) to (6), inclusive, of subdivision (a) until the payments required in any fiscal year pursuant to paragraph (1) of subdivision (a) have been funded.

(c) Pursuant to subdivision (a), the Joint Committee on Fairs Allocation and Classification shall review and

concur, or not concur, with the secretary's determination of the allocations to be made pursuant to paragraphs (3) to (6), inclusive, of subdivision (a) in total, and the committee may not add to, or delete projects or line items from, the proposed allocations.

(d) Approval of the Joint Committee on Fairs Allocation and Classification is deemed complete when one of the following conditions is met:

(1) The annual budget act is enacted.

(2) If the secretary's recommendations are received by the Joint Committee on Fairs Allocation and Classification after the enactment of the annual budget act, the recommendations shall be deemed approved 30 days after they are received unless they are rejected by the committee.

(e) If the Joint Committee on Fairs Allocation and Classification does not concur with the secretary's recommendations, the secretary may submit another set of recommendations to the committee pursuant to this section.

(f) The payments required in any fiscal year for the purposes of paragraphs (1) to (3), inclusive, of subdivision (a) shall be made before any transfer is made pursuant to subdivision (g).

(g) Except as otherwise provided in subdivision (f), when the revenues deposited in the separate account exceed eleven million dollars ($11,000,000) in any fiscal year, 98 percent of the amount in excess of eleven million dollars ($11,000,000) shall be transferred to the General Fund.

(h) All of the costs of administering the accounts created by subdivision (a) and Section 19606.3 shall be charged to the respective accounts.

SEC. 31. The power to tax may not be surrendered or suspended by grant or contract. [*New section adopted November 5, 1974.*]

PROOF OF SERVICE BY MAIL
(Code Civ. Proc. § 1013(a))

I am over the age of 18 years and not a party to the within action; my business address is 770 L Street, Suite 800, Sacramento, CA 95814.

On September 16, 1997, I served the foregoing **PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC** on the parties in said action by enclosing a true copy thereof in an envelope and placing the envelope for collection and mailing on the date and at the place set forth above following our ordinary business practices, addressed as follows:

PLEASE SEE ATTACHED LIST

I am readily familiar with this firm's practice for collecting and processing envelopes for mailing. On the same day that envelopes are placed for collection and mailing, they are deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 16, 1997, at Sacramento, California.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CABAZON AND SYCUAN BANDS OF MISSION INDIANS, Plaintiffs/Appellees, and **BARONA AND VIEJAS BANDS OF MISSION INDIANS,** Intervenors-Plaintiffs/Appellees, vs. **PETE WILSON,** Governor of the State of California; **STATE OF CALIFORNIA;** and **CALIFORNIA HORSE RACING BOARD,** Defendants/Appellants.	No. 96-16432 No. 96-16443
SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC., ET AL., Applicants in Intervention/Appellants.	

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I. THE RACING INDUSTRY HAS FAILED TO PRESENT ANY COGNIZABLE GROUNDS FOR REHEARING OR REHEARING EN BANC.

A. The Panel applied the proper standard of review and correctly affirmed the district court's determination that the Racing Industry waited too long to intervene.

F.R.A.P. 40 requires that a petition for rehearing "state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." The Racing Industry's Petition for Rehearing ("Petition" or "RIP") does neither. Instead, the Racing Industry contends that this panel should determine *de novo* the timeliness of its application for intervention, and consider the arguments it would have made to the district court had intervention been granted. This court, however, is to review the district court's denial of intervention solely for an abuse of discretion; a determination of untimeliness obviates the need to consider – much less determine – whether the Racing Industry satisfied the other criteria for intervention as of right. *See, e.g., United States v. State of Washington*, 86 F.3d 1499 (9th Cir. 1996); *see also, County of Orange v. Air California*, 799 F.2d 535 (9th Cir. 1986); *Empire Blue Cross and Blue Shield v. Janet Greeson's A Place for Us, Inc.*, 62 F.3d 1217 (9th Cir. 1995); *League of United Latin American Citizens v. Wilson*, 1997 WL 769372, 97 D.J.D.A.R. 15021 (9th Cir., Dec. 12, 1997).

Abuse of discretion is precisely the standard by which the panel reviewed this case. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1061. Consequently,

the Racing Industry has no right to reargue the merits of its illusory claims in its Petition.

Even if *de novo* review of the district court's denial of intervention as untimely was appropriate, the record amply supports the wisdom of that court's decision. The Racing Industry does not deny that it waited nearly six years after this action was filed before seeking intervention; that it delayed its petition for more than two years after this Court's May 9, 1994 decision that IGRA preempted the State from taxing wagers placed on Tribal lands (*Cabazon Band of Mission Indians, et al. v. Wilson, et al.*, 23 F.3d 1535, Opinion withdrawn and superseded, 37 F.3d 430 (9th Cir., October 6, 1994); or that it dawdled almost two years after this Court's final opinion in *Cabazon II, id.*, before finally trying to intervene.

Despite the passage of so much time and receipt of multiple warnings that the Tribes – not the State or the Racing Industry – would be awarded what the State formerly received as a license fee, the Racing Industry *still* postponed its petition seeking intervention. The Racing Industry did, ultimately, petition to intervene – seven months after the State amended its answer to assert the absence of the Racing Industry as an affirmative defense, and nearly three months after the district court concluded that the Racing Industry need not be joined, resolved the remaining issues in the case in favor of the Tribes and ordered the State to pay the disputed fees over to the Tribes. At that point, the Racing Industry had to sustain a

heavy burden to prevail.[1] The Racing Industry's excuse for waiting so long to seek intervention, *i.e.*, that the case was so complex that its lawyer, who had represented the State in this action for the preceding five years and in November, 1995, asserted on behalf of the State the Racing Industry's non-joinder as the State's Fifth Affirmative Defense to the Tribes' respective Amended Complaints (*see e.g.*, C.R. 98), needed another eight months to figure it out.

The State always has argued that both the legal incidence and economic burden of the State license fee falls on the Racing Industry, the district court and *Cabazon I* agreed with that contention, and since 1990 the Racing Industry has entered into successive agreements with the Tribes affirmatively disclaiming the Racing Industry's right to or interest in the disputed fees. *See, e.g., Cabazon Band of Mission Indians v. Wilson*, 788 F.Supp. 1513 (E.D. Cal. 1992); State's Opening and Reply Briefs in *Cabazon II;* CR 131, and attached Exhibits. Moreover, and as correctly noted by this panel, even if the Racing Industry had no immediate interest in the original litigation, "surely they should have known what was in the offing after our October 1, 1994 decision in Cabazon II and after the

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[1] As the Ninth Circuit recently held in *League of United Latin American Citizens v. Wilson, supra*, 97 D.J.D.A.R. at 15022,

> In considering these factors, however, we must bear in mind that "any substantial lapse of time weighs heavily against intervention." [Cit. Om.] Because ACNFARI filed its motion a full twenty-seven months after the original actions challenging Proposition 187 were commenced, it fights an uphill battle in its effort to intervene.

district court, on July 12, 1995, ordered the Bands to file a new complaint to enforce ¶19(B)(3)." *Id.* In fact, this finding was far more solicitous of the Racing Industry than it deserved.

Neither State law, the actual language of ¶19 of the Compacts,[2] nor the positions taken by the parties[3] has

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[2] The language of ¶19(B) of the Cabazon Compact is set forth in the Court's Opinion. 124 F.3d at 1050. The virtually identical language of ¶19(B)(3) in the Sycuan Compact is reproduced below:

> In the event that a final judgment is obtained that the deduction and distribution of a state license fee is impermissible under the Act, and following the exhaustion of all appellate review, the State shall pay over to Sycuan the amount of the state license fee previously distributed to the State under this Compact, exclusive of the assessments due and owing under subparagraph (4) below, and Sycuan shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Sycuan simulcast wagering facility. The amount of state license fee previously distributed to the State and not reasonably claimed by the State as due and owing from the commencement of operation of the facility, and such pre- or post-judgment interest, if any, as the Court may determine, shall be paid over to Sycuan as soon as practicable, and in any event not later than sixty (60) days following the entry of final judgment.

[3] From the beginning, the State has argued that its tax is on the Racing Industry and thus is not impermissible under IGRA. The Tribes have argued, from the beginning, that the State's tax on wagers at the Tribes' simulcast facilities is impermissible under IGRA regardless of the legal incidence of the tax, that IGRA allows the State and the Tribes to alter the State's statutory distribution formula so that the Tribes will receive the tax that the State otherwise would receive, and thus that under

ever left open a possibility that the Racing Industry might be entitled to the windfall that it sought by its untimely application for intervention. Conversely, IGRA specifically authorizes the result of *Cabazon II* and the decision of the panel, in that 25 U.S.C. §2710(d)(3)(C)(iv) specifically contemplates the shifting of taxation of on-Reservation Class III gaming activity from the State to Tribes.[4] That is, in effect, exactly what the State and the Tribes agreed in these Compacts, and that is why *Cabazon II*, the district court and this panel properly determined that the Tribes – not the Racing Industry – are entitled to an amount equal to past and future State license fees on the gross handle of wagers at the Tribes' simulcast facilities.

Because the Racing Industry did not seek post-judgment intervention for purposes of appealing from the district court's judgment or from an order denying class certification, its reliance on cases such as *United States v. McGough*, 967 F.2d 1391 (9th Cir. 1992), and *United Airlines v. McDonald*, 432 U.S. 385 (1977), is misplaced. In hindsight, the Racing Industry may have "bet on the

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the Compacts, the Tribes are entitled to receive an amount equivalent to the State tax on bets at their facilities.

[4] That section provides in relevant part:

> Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities . . .

Thus, under *Cabazon II*, if the State cannot tax wagers placed at the Tribes' facilities, the State and the Tribes may agree in their Compacts that the Tribes may do so.

wrong horse" when it sat back and let the State represent its purported interest in the license fees. That, however, is precisely the choice made by the Racing Industry, which must now live with the consequences of its choice.[5]

B. The Racing Industry has not presented any reasons for granting rehearing en banc.

F.R.A.P. 35 permits a case to be heard *en banc* when necessary to secure or maintain uniformity of its decisions, or when the proceeding involves a question of exceptional importance. The Racing Industry has suggested rehearing *en banc*, but its Petition for Rehearing neither identifies any conflicting decisions of other Ninth Circuit panels, nor demonstrates why review of the district court's exercise of discretion to deny intervention involves a question of exceptional importance. Accordingly, the Racing Industry's suggestion for rehearing *en banc* should be rejected.

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[5] As another Ninth Circuit panel aptly observed in affirming the denial of intervention as untimely in *Empire Blue Cross and Blue Shield v. Janet Greeson's A Place for Us, Inc., supra*, at 1222 (Wiggins, J.), "It seems inequitable to allow a latercomer, who fiddled while Rome burned, to collect a share of the fire insurance."

II. THE STATE HAS NOT PRESENTED ANY COGNIZABLE BASIS FOR REHEARING OR REHEARING EN BANC.

A. The grounds for rehearing asserted by the State are precluded by the law of the case.

As the Ninth Circuit interprets and applies the jurisprudential doctrine of "law of the case," the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case. *In re Rainbow Magazine, Inc.*, 77 F.3d 278 (9th Cir. 1996); *Kimball v. Callahan*, 590 F.2d 268, 771 (9th Cir. 1974), *cert. denied*, 444 U.S. 826 (1979)[6]; *see also, Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997, en banc).[7]

Although the law of the case doctrine is discretionary, the Court's discretion is not unfettered. Rather, the prior decision must be followed unless: 1) the decision is clearly erroneous and its enforcement would work a manifest injustice; 2) intervening controlling authority or statute makes reconsideration appropriate; or 3) substantially different evidence was adduced at a subsequent trial. *Jeffries v. Wood, supra, at* 1489. Nothing in the State's

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[6] "[U]nder the 'law of the case' doctrine one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case."

[7] "Law of the case rules are founded upon 'the sound public policy that litigation must come to an end. An appellate court cannot efficiently perform its duty to provide expeditious justice to all if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal.' " *Id.*, at 1489.

Petition for Rehearing ("Petition" or "SP") supports application of any of the exceptions to the law of the case doctrine.

Having failed to seek further review of *Cabazon II*, the State cannot show that it was clearly erroneous. Indeed, this panel found that "Our decision in *Cabazon II* is central to the resolution of the instant dispute, and it limits the task before us." *Cabazon Band v. Wilson*, 124 F.3d at 1054.[8]

Neither can the State show the exceptional circumstances necessary to establish a manifest injustice, because *Cabazon II* did not involve "a significant inequity or the extinguishment of a right." *See, Jeffries v. Wood*,

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[8] The State is simply wrong when it asserts that this panel reconsidered the Court's opinion in *Cabazon v. Wilson*, 37 F.3d 430 (9th Cir. 1994). SP, p. 10. There can be no doubt from this panel's Opinion that this panel *relied on* – rather than reconsidered – *Cabazon II* when it observed that *Cabazon II*,

> . . . held that "IGRA preempts the State of California from taxing offtrack betting activities on tribal lands." [cit.om.] Analyzing "whether Congress has, by implication, acted to preempt the extension of state authority onto Indian reservations in this instance," [cit.om.], we considered federal, tribal, and state interests in the extension of the State's licensing scheme to tribal gaming. Central to our analysis was our conclusion that, under the terms of the compacts which govern this case, the Bands have a "right" to the unpaid license fees. We remanded to the district court with instructions to enter summary judgment in favor of [the Tribes]. Our decision in Cabazon II is central to the resolution of the instant dispute and it limits the task before us.

Cabazon Band v. Wilson, 124 F.3d 1050, 1054.

supra, at 1492. The panel in *Cabazon II*, the district court on remand and this panel each found that there has not been *any* inequity in holding the State to the agreement of the parties reflected by the plain language of ¶19 of the Compacts.

Finally, no intervening case law or statute warrants reconsideration of the final judgment in *Cabazon II*, from which the State did not seek certiorari. The district court gave the State every opportunity to argue that *Cabazon II* should not control the outcome on remand. Those arguments were made to and properly rejected by both the district court and this panel. The State's concoction of new variations on its old themes does not justify ignoring *Cabazon II* as the law of this case.

B. The State otherwise has failed to demonstrate any cognizable basis for rehearing.

The State's Petition, at pages 4-7, not only seriously misstates the plain language of ¶19 of the Compacts, but further attempts to interject a revisionist history of the compact negotiations that neither is accurate nor part of the record in this case. ¶19 of the Compacts makes absolutely clear that both the State and the Tribes understood that the wagers placed at the Tribes' facilities would be taxed. Moreover, there never was any dispute between the parties that under State law, as *partially* incorporated into the Compacts, the Racing Associations would deduct taxes from wagers placed at the Tribes' facilities.[9] Thus,

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[9] The panel correctly noted that, "from the inception of this litigation, it was clear that the license fees at issue in this case are paid by the racing associations." 124 F.3d at 1061.

the only point of contention, the only issue addressed in ¶19 and the only issue sought to be adjudicated by the Tribes in this litigation is whether the taxes deducted from wagers placed at the Tribes' facilities are to be distributed to the State or to the Tribes.

¶19 of the Compacts allows only the Tribes or the State to get the money – not the Racing Industry. The State's subsequent arguments – that depending on the basis upon which the legal issue was resolved, the State might be, and in fact should have been, relieved of its obligation to require continued collection of the taxes by the Racing Associations and payment of those monies to the Tribes as tax revenues generated by on-Reservation wagering activity – clearly is *post hoc* revisionism that is belied by the plain language of ¶19.

The State's repeated assertion that the decisions in this case require it "to tax the racing industry for the benefit of the Tribes," *see, e.g.*, SP, at page 6, n. 3, similarly is inaccurate. Rather, these decisions merely require the State to fulfill its agreement with the Tribes – which has the force of federal law by virtue of incorporation into the Compacts – by requiring the Racing Associations to continue collecting taxes from the wagers placed at the Tribes' facilities and to pay those particular taxes over to the Tribes as a Tribal tax on the on-Reservation wagers.[10]

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[10] Calif. Bus. & Prof. Code § 10605.3(e) provides as follows:

> (e) Notwithstanding any other law or any agreement under subdivision (a), for purposes of determining license fees and breakage at the racetrack where the racing meeting is conducted, wagers at a satellite wagering facility shall not be

There is nothing unconstitutional or illegal about this arrangement. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (holding that a Tribe may tax on-Reservation transactions). In fact, it is merely one of only two contingencies that the State itself negotiated in ¶ of the Compacts, and which was approved by the Secretary of the Interior when he approved these Compacts.

When the State's labyrinthine Petition is stripped of its italicized invective, self-serving – and inaccurate – historical narrative,[11] and repeated expressions of regret over the bargain that it struck with the Tribes, it is revealed as nothing more than a repackaging of the same arguments that were rejected in *Cabazon II*, by the district court on remand and again by this panel.

When the State claims that, "[t]he parties had agreed that, if the tax were found impermissibly to burden tribal assets, then the State would restore the taxes to the Bands[,]" SP, at p. 6), it fails to rely on anything in the record. This contradiction is also contrary to the actual

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included in the conventional or exotic pools of the association conducting the racing meeting.

[11] The State repeatedly – and erroneously – contends that *Cabazon II* rested upon the Court's finding that allowing the State to collect its license fee would result in the State receiving more revenue from the on-Reservation wagering than the Tribe, contrary to IGRA's requirement that the Tribe be the primary beneficiary of on-Reservation gaming. As this panel's Opinion recognized, *Cabazon II* determined that the State's jurisdiction to assess its tax against on-Reservation wagering activity instead was preempted under the "balancing test" used to resolve jurisdictional conflicts in Indian country.

language of ¶19. In fact, this contention is a mere continuation of the State's baseless – and thrice-rejected – attempt to inject into this case its *post hoc*, subjective interpretation of what it intended to agree to in ¶19. The State's [illegible]tion not only furnishes no basis for now admitting extrinsic evidence of the State's subjective intent, but also provides no grounds for disregarding the conclusion of every court that has considered this assertion.

In arguing that the panel's purported abandonment of the "primary benefits" analysis means that the State's license fee is just as negotiable as are the other "takeouts" from wagers at the Tribes' simulcast facilities, and thus that the State should have won *Cabazon II*, the State has distorted this panel's analysis beyond recognition. The compacts themselves reflect the parties agreement that

> subject to subsections (B) and (C) below, the amounts deducted from parimutuel wagers from [Tribal facilities], and the distribution of such amounts, shall be the same as that provided for under state law for simulcast wagering facilities.

¶19(A) of Cabazon Compact; Exhibit 2 to Cabazon and Sycuan Opposition to Appellants' Rule 27-3 Emergency Motion. In fact, the Panel acknowledged the qualitative distinction between "takeouts" that directly or indirectly compensate the Racing Industry and others for services actually provided to the Tribal facilities, and deduction and distribution to the State's general fund of the State's tax on wagers placed at the Tribes' facilities.

Any complexity in this case on remand was not due to *Cabazon II*. *Cabazon II* could not have been clearer. Had

the district court promptly done as instructed therein, these protracted proceedings would have been over literally years ago. All that should have happened on remand was what the Tribes attempted to accomplish by their motion for further relief pursuant to 28 U.S.C. §2202; *i.e.*, immediate entry of summary judgment for the Tribes ordering the State 1) to pay over to the Tribes the license fees previously distributed to the State and 2) to take such measures as might be necessary to accomplish the future disbursement to the Tribes of sums equal to what otherwise would be deducted and distributed to the State as a license fee on wagers placed at the Tribes' facilities.[12]

At worst, all of this could – and should – have been accomplished by the district court's granting of the Tribes' motion for further relief pursuant to 28 U.S.C. §2202, after the State tried to repudiate the commitments that it specifically made in the Compacts. In short, the Tribes never should have been forced to file amended complaints to enforce the Compacts; they should not have had to do anything more than seek enforcement of a judgment promptly entered on remand, as this Court specifically directed.

The State's assertion that it "declined to be bound by a compact whose terms were *dictated* by a panel of this Court," SP at p. 7 [emphasis original], had and has no cognizable basis. The State, ably represented by legal

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[12] "We conclude that IGRA preempts the State of California from taxing offtrack betting activities on tribal lands. Accordingly, the district court's grant of summary judgment is reversed and remanded with instructions to enter summary judgment for the Bands." *Cabazon II*, 37 F.3d 435.

counsel, freely agreed to the plain language of ¶19 of the Compacts. That the State currently regrets the tax-distribution provisions that now apply to the Tribes' simulcast facilities as a matter of federal law provides no justification for forcing the Tribes to relitigate this matter yet again.

Neither is there any basis for the State's contention that the Court's decisions "stripped the State of any benefit of its bargain with the Bands[,]" SP, at pp. 6-7, deprived the State of tax revenues that it otherwise would be entitled to collect and forced the State to collect taxes on behalf of the Bands. Under IGRA, the State has no right to exclude Tribes from engaging in Class III gaming solely to protect state-sanctioned competitors; likewise, IGRA does not entitle the State to derive any revenues or other financial benefit from Tribal gaming beyond reimbursement for the State's regulatory costs, if any.[13] Rather, the "benefits" that were conferred upon a State by entering into the Compacts included integration of the Tribal facilities into the State-supervised system, creation of additional sources of revenue for the Racing Industry and prevention of the Tribes' establishment of their own race books which the State otherwise would have no jurisdiction to regulate. *See, e.g., Sycuan Band of Mission Indians v. Roache, supra.*

The State's argument that the panel's most recent Opinion violates the State's rights under the Tenth

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[13] As noted in *Cabazon II*, the Compacts specifically provide for Tribal reimbursement of the State's actual regulatory costs, which were minuscule in comparison with the license fees collected.

Amendments ignores the simple fact that the federal government hasn't commandeered anything from the State. Simply put, the State *agreed* with the Tribes that if its authority to tax the wagers made at the Tribes' simulcast facilities was impermissible under IGRA, an amount equal to the State's tax would be paid over to the Tribes, and in the future the Tribes would receive an amount equal to what otherwise would be deducted and paid over to the State. If, as the State argues (and the district court found), the license fees are remitted by the Racing Industry, there is no need to involve the State in future collections. Moreover, the State has agreed to a mechanism for payment over to the Tribes of fees previously distributed to the State. *See, e.g.*, September 25, 1996 Stipulation for Modification of Order Staying Judgment, and October 22, 1996 Order thereon filed in this Court.

Two final points warrant discussion. First, at least two Courts of Appeals have concluded that IGRA does not violate the State's rights under the Tenth Amendment. *See, e.g., Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993); *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), vacated on other grounds, ___ U.S. ___, 116 S.Ct. 1410 (1996), holding that IGRA does not violate Tenth Amendment affirmed on remand, 89 F.3d 690 (10th Cir. 1996). Second, that the district court clearly had jurisdiction over the Tribes' action.

The panel found two alternative grounds for sustaining such jurisdiction. First, this case involves important federal interests codified in IGRA – interests that in and of themselves give rise to federal question jurisdiction. *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804,

814, n. 12 (1986). Under IGRA, Congress gave Tribes the right to conduct Class III gaming pursuant to negotiated compacts, and outlined the rights Tribes and States could have under those compacts. This case established and enforced these federal rights and, as the Supreme Court has stated, "the federal nature of the right to be established is decisive" of whether the action arises under federal law. *Gully v. First National Bank*, 299 U.S. 109 (1936).

Alternatively, the panel correctly found federal question jurisdiction in this case under 28 U.S.C. §1362, in that *Cabazon II* held that federal law preempts the State's retention of taxes in this case, and the Bands' suit merely sought recovery of monies collected and held by the State in violation of federal law. In another IGRA case, the Seventh Circuit found federal question jurisdiction, noting that the right to be enforced was federal in nature, "whether its source is the IGRA, the Compact, the Indian Commerce Clause or federal recognition of the inherent sovereign powers of an Indian tribe." *Forest County Potowatomi Community v. Norquist*, 45 F.3d 1079, 1082 (7th Cir. 1995). Likewise here, the Tribes' right to the funds in question arises under federal law.

Finally, there is a third basis for sustaining jurisdiction in this case. All parties, including the State and the dissenting judge on the panel, agree that the district court had jurisdiction to adjudicate the Tribes' action for original declaratory judgment. That being the case, the court necessarily had jurisdiction under 28 U.S.C. §2202 to enter such further orders as were necessary to give complete and effectual relief consistent with its declaratory judgment. *Rincon Band of Indians v. Harris*, 618 F.2d 569,

575 (9th Cir. 1980); *Horn & Hardart Co. v. Nat'l, Rail Pass. Corp.*, 843 F.2d 546, 548-49 (D.C. Cir. 1988). Although the district court allowed the case on remand to become more complex, the order finally entered could and should have been entered in response to the Tribes' motion for further relief under 28 U.S.C. §2202, a motion over which the court plainly had jurisdiction. Because this Court can affirm on any ground presented, whether or not relied upon by the district court, *see e.g., Fosson v. Palace (Waterland), Ltd.*, 78 F.3d 1448 (9th Cir. 1996), the panel should find that the district court had jurisdiction over the Tribes' action.

C. The State has not demonstrated a need for rehearing en banc.

Although F.R.A.P. 35 allows for rehearing *en banc* only when necessary to secure or maintain uniformity of its decisions, or when the proceeding involves a question of exceptional importance, the State contends only that rehearing *en banc* is necessary, "because the Court overlooked serious flaws in its jurisdictional analysis." SP, at p. 15.

The State has not identified any other Ninth Circuit decision with which the panel's opinion conflicts or otherwise is inconsistent. Thus, *en banc* consideration is unnecessary to secure or maintain the uniformity of the Court's decisions.

En banc consideration may be appropriate in an extremely unusual case in order to cure a gross injustice. Holding the State to the express terms of the Compact to which it agreed hardly constitutes a gross injustice.

Indeed, the only unusual aspect of this case is the State's persistence in refusing to accept the combined impact of the decisions of *Cabazon II*, the district court on remand and this panel. The panel's adherence to the final and unappealed decision in *Cabazon II* hardly constitutes a question of "exceptional importance" that would warrant *en banc* reconsideration of the panel's decision.

In *Wisconsin Winnebago Nation v. Thompson*, 22 F.3d 719 (7th Cir. 1994), the Court of Appeals held that the Tribe and the State were bound by the terms of the compact they had negotiated, and that neither party could "make an end run" around its existing agreement. *Id.* at 724. Precisely the same conclusion is warranted in this case.

CONCLUSION

For all of the reasons set forth above, and in this case's seventh year, the Petitions should be denied, and the suggestions for rehearing *en banc* should be rejected.

Dated: December 29, 1997

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I, George Forman, certify that Appellees' combined, single Response to the Petitions for Rehearing and Suggestions for Rehearing *En Banc* is double-spaced, uses a Times-New Roman proportionately-spaced typeface of fourteen points, and contains 4,845 words.

Dated: December 29, 1997

/s/ George Forman
GEORGE FORMAN

CERTIFICATE OF SERVICE BY U.S. MAIL

I, Grace C Chiu, declare as follows:

I am a citizen of the United States of America, over the age of 18 years, and not a party to the above-entitled action. I am employed in the county of Marin, California. My business address is 4340 Redwood Highway, Suite F228, San Rafael, California 94903.

On December 29, 1997, I served true and correct copies of the **RESPONSE OF PLAINTIFF-APPELLEE TRIBES TO PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC** via United States Mail by placing true and correct copies thereof in separately sealed envelopes, first class postage-prepaid, in the United States Mail in San Rafael, California, addressed as follows:

(2 Copies)

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I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on December 29, 1997 at San Rafael, California.

/s/ Grace C Chiu
Grace C Chiu